90-607

No. _____

Supreme Court, U.S.
FILED
OCT 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1990

CARL G. ADAMS,

*Petitioner,*

vs.

STATE OF MISSOURI,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Missouri**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

When reviewing a denial of a motion to suppress, may the appellate court "freely disregard" all contrary evidence and inferences, affirming the trial court's ruling if the evidence is "sufficient" to sustain the ruling? Or, must the appellate court adhere to a higher standard which at least requires the ruling to be supported by substantial evidence?

In the case at bar, the state court employed the first standard, disregarding both Petitioner's and the Respondent's evidence which indicated that Petitioner was using an immobile van as a dwelling. The state court thus rejected Petitioner's contention that he was illegally arrested within the curtilage portion of a farm.

II.

Whether there was probable cause to believe that Petitioner was manufacturing marijuana based on the following facts: one, Petitioner was the co-owner of a farm consisting of eighty acres; two, there were some marijuana plants growing in what appeared to be a harvested corn field; three, marijuana plants "appeared to be cultivated"; and four, there were some tire tracks leading to the marijuana plants. These plants were in an open field, not readily visible from the buildings on the farm about an eighth to a quarter of a mile from such buildings. In addition, Petitioner had not been observed on the premises until the time of arrest – about six days after

## QUESTIONS PRESENTED – Continued

discovery of the plants – and then he was located in the area of the buildings.

III.

Whether fundamental unfairness occurred when the prosecutor failed to disclose to Petitioner's counsel until midway through trial an alleged statement of Petitioner which was inconsistent with his disclosed statements. Petitioner's counsel had filed a request for discovery which, among other things, required disclosure of all of Petitioner's statements. The disclosed statements revealed that Petitioner found a "bag of plants" at a certain location on his farm, while the undisclosed statement revealed that Petitioner found the bag at another location away from his farm.

The prosecutor appears to have deliberately failed to disclose the inconsistent statement, and during closing argument, he repeatedly relied upon the inconsistent statement to attack Petitioner's credibility. Whether Petitioner knew about the contraband nature of the plant material (marijuana) was a disputed issue.

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No. -_____

In The

# Supreme Court of the United States

October Term, 1990

CARL G. ADAMS,

*Petitioner,*

vs.

STATE OF MISSOURI,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Missouri**

## PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice, and Associate Justices of the Supreme Court of the United States.

Carl G. Adams, the Petitioner herein, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Supreme Court entered in the above-entitled cause on July 31, 1990.

## OPINIONS BELOW

The modified opinion of the Missouri Court of Appeals, Western District, WD No. 42452, is attached hereto as Appendix "A" at pages A-2 to 12, plus the original opinion at pages A-12 to 14, and the denial of the Application for Transfer to the Missouri Supreme Court, No. 72914, at page A-42.

## JURISDICTION

The Missouri Court of Appeals, Western District, entered its judgment on May 29, 1990, affirming the conviction. Petitioner timely filed a motion for rehearing/motion for transfer. (Appendix A at A-15 to 25). Respondent filed a motion to modify opinion in lieu of a hearing. (Appendix A at A-25 to 29). The Court of Appeals modified its opinion on June 28, 1990, and then denied and overruled the Motion for Rehearing and/or Transfer to Supreme Court on July 3, 1990. (Appendix A at A-1 and 30) The Missouri Supreme Court denied the discretionary Application for Transfer on July 31, 1990. Jurisdiction is with this Court pursuant to 28 U.S.C. Section 1257, Supreme Court Rules 10 and 16, and elsewhere as provided by law.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitution of the United States, Amendments IV, V, VI, and XIV

### AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Statutes of Missouri

### MO. REV. STAT. SEC. 542.296

**1.** A person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized. For the purposes of this section, a pending criminal proceeding shall mean any criminal investigation being conducted with the intention of using the seized subject matter in seeking an indictment returned.

**6.** The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The burden

of going forward with the evidence and the risk of non-persuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled.

## STATEMENT OF CASE

Because this case involves a curtilage question, Petitioner has attached hereto in Appendix "B" copies of certain court exhibits which reflect the boundaries of the farm and the location of the buildings thereon. These exhibits were marked as "Defendant's Exhibits 1 and 2". Also included therein are excerpts from one of the appeal briefs and from the trial transcript. (Appendix B at B-1 to 11).

Petitioner filed a motion to suppress pursuant to MO.REV.STAT. Section 542.296, alleging a Fourth Amendment violation (Appendix C at C-1 to 3). The hearing on the motion occurred on March 20, 1989. The Petitioner filed suggestions in support of the motion, and the state filed suggestions in opposition. The trial court overruled the motion without any findings of fact on April 5, 1989 (Appendix C at C-4).

Based on the evidence presented at the motion to suppress and the trial, Petitioner submits the following statement of facts:

With regard to the premises, it is essentially an eighty (80) acre farm. County roads form the boundaries on the west (west road) and south (south road) side of the farm. In the southwest corner of the farm, Adams placed an immobile van type vehicle or trailer type vehicle which

was used as living quarters and storage. A driveway began at the west road, running generally in an easterly direction by the trailer. Nearby the trailer to the north, there were several structures, including a barn and two sheds, which were used for storage of vehicles and other items. Surrounding these structures was a fence (Exhibit 1 and 2, Appendix B at B-10 and 11).

On or about September 18, 1988, Sheriff Tom Houghton met with a person named Mike Heckenbach and his son after receiving a report from Heckenbach that some marijuana might be growing on a farm near his own farm southeast of Pattonsburg, Daviess County, Missouri. According to Heckenbach, his son had been on the farm when he discovered the plants. Heckenbach confirmed the location and reported it to Sheriff Houghton. (Tr. 66-69).

Upon contacting the Heckenbachs, Sheriff Houghton proceeded to the farm, driving the south road, and entered the premises from the south side. (Appendix B at B-10) (Tract 2). They then proceeded north across a disked field and located the patch on the north side of the premises in a stubble corn field. (Appendix B at B-10) (Tract 3); Sheriff Houghton believed that the plants were marijuana, but because it was getting dark, he decided to leave, sending a deputy back to the area the next day to confirm the find. (Tr. 60, 67-73).

On or about September 22 or 23, 1988, Sheriff Houghton, along with several other deputies and state troopers, went to the premises to destroy the plants. Before proceeding to the field, the officers stopped by the trailer to see if anyone was present. Finding no one, the

officers proceeded up the south road, entered the premises, and destroyed the plants. (Tr. 58-61, 73-75, 137-150).

Sheriff Houghton then relayed these events to the prosecuting attorney of Daviess County, Syd Weybrew. The prosecutor filed a complaint, charging Adams with manufacturing marjuana. The associate judge then issued an arrest warrant based upon the complaint. The Court of Appeals ruled that this warrant was invalid because the complaint did not contain sufficient facts to support a finding of probable cause. (Appendix A at A-3 to 6).

On September 24, 1988, at approximately 2:30 P.M., Deputy Wright received a dispatch from the sheriff's office that Carl Adams was present on the farm and that he was to go to the premises to arrest Adams pursuant to the arrest warrant. Prior to entering the premises, Deputy Wright rendezvoused just north of the Adams' property with Trooper Kimberling to plan the arrest. Both officers were in full uniform and armed and were operating marked police vehicles. (Tr. 10, 15, 37, 38, 44, 47).

Around 3:15 P.M., the two officers drove their own vehicles to the farm and entered the premises by means of the driveway. The officers blocked the entrance to the premises, exited their vehicles and approached Adams and Adkins, who were standing in the yard near the immobile trailer. The officers then "walked up through the yard to there, where they were standing." (Tr. 12-15, 38, 44-48, 54).

Upon contacting the parties, Deputy Wright asked Adams if he was Carl Adams, to which he responded affirmatively. Deputy Wright then informed Adams that "he was under arrest on a warrant we had for him."

Upon identifying Adkins, Deputy Wright arrested her, placing handcuffs on both parties. Deputy Wright next informed Adkins and Adams of the Miranda warnings, to which both acknowledged an understanding. (Tr. 6, 7, 15, 38-40, 48-50).

After Deputy Wright informed Adams that he was under arrest for manufacturing marijuana, Adams responded "that he knew it was there but it wasn't his, and he's been watching it because he knew they was going to come back and harvest it, and he had been watching it." Later the same day, he gave a written statement while in custody at the county jail indicating his knowledge about the plants. (Tr. 19, 52, 53, 64-66, 83, 86). (Appendix B at B-13 and 14).

While waiting for the sheriff to arrive, Trooper Kimberling checked a rifle which was located on a barrel near the arrest scene. Meanwhile, Deputy Wright informed Sheriff Houghton about the arrests by way of a portable radio. After checking this rifle, Trooper Kimberling asked Adams if any other guns were located on the premises, to which Adams replied that a gun or guns were located in a 1982 Plymouth pickup, about 100 feet to 50 yards away from them near the barn. Trooper Kimberling then departed to secure the gun(s). (Tr. 20, 21, 27, 28, 50, 51, 135, 136).

Upon entering the pickup, Trooper Kimberling observed part of a shotgun sticking out from behind the seat. Trooper Kimberling pushed the seat forward and secured the gun(s). At this time, he did not observe any contraband nor smell any odors of contraband materials. And, although he observed the trash bag in question,

Trooper Kimberling claimed that he did not open it or seize it because he did not have permission to search. (Tr. 34, 140, 141, 144, 145, 150).

Deputy Smith next arrived upon the scene. He first observed Deputy Wright, Trooper Kimberling, Adkins, and Adams "standing in the – I guess what you would call a yard at the farm up there." Adkins and Adams were still handcuffed, and the sheriff had not yet arrived. (Tr. 90 and 91).

Within five to ten minutes, at about 3:30 P.M., Sheriff Houghton arrived upon the arrest scene. Sheriff Houghton first spoke with Deputy Wright, asking him whether he had given Adkins and Adams the Miranda warnings. Deputy Wright responded affirmatively. At some point after securing the gun(s), Trooper Kimberling returned to the scene and conferred with the sheriff and the deputies. The sheriff also decided to release Adkins from her handcuffs because he did not have a warrant for her arrest. (Tr. 22, 23, 30, 54, 55, 63, 78, 79, 141, 142).

After Adkins was released from the handcuffs, Trooper Kimberling asked Adams if he could search the Plymouth pickup and a van. Adams affirmatively responded, but stated that the truck and van were owned by Adkins. Trooper Kimberling next asked Adkins for permission to search the vehicles, to which she also responded affirmatively. Trooper Kimberling and Deputy Smith then departed. Sheriff Houghton searched the immobile trailer, while Deputy Wright "stayed up there with the two defendants." In the course of searching the pickup, Trooper Kimberling and Deputy Smith opened the trash bag discovering what appeared to them to be

marijuana. No other contraband was discovered in any of the other vehicles or structures. (Tr. 8, 9, 30, 31, 40, 41, 55, 63, 64, 79, 80, 91, 92, 121, 142, 143, 165, 168, 169, 198 and 199).

Sometime thereafter, while still at the farm, the officers confronted both Adkins and Adams with the marijuana. Adkins denied any knowledge about the presence of the marijuana. Adams stated that about four days earlier he had picked up the bag at the entrance to the stubble corn field on his farm and placed it in the pickup. (Tr. 57 and 58, 192-198, 201).

The trial began on August 15, 1989. During the pretrial motions the state requested leave to endorse Deputy Wright as a witness. The following discussion occurred:

> MR. WEYBREW: Bill Wright, also, you Honor, was the signator on numerous reports that were furnished to Mr. Brown in the year 1988. He's a deputy sheriff.
>
> MR. ROY BROWN: I think he shouldn't be able to endorse him as a witness at this late date. I think I had a right to think he wouldn't use him.
>
> THE COURT: When did you advise Mr. Brown you were going to endorse him?
>
> MR. WEYBREW: It was the latter part of last week, your Honor. Mr. Wright's identity and the substance of his testimony has been known to Mr. Brown since disclosure was given to Mr. Brown in, I believe, November of 1988.
>
> THE COURT: Do you desire time to interview Mr. Wright?
>
> MR. ROY BROWN: No, your Honor.

> THE COURT: All right. The Court will allow the State to endorse . . . Bill Wright.
>
> (Tr. 100).

The Petitioner then presented additional evidence regarding his use of the trailer and the area surrounding the trailer. Adams basically testified that he used the immobile van as living quarters – specifically, this "is the area that I lived in and kept mowed and used as a barn and I kept my dogs there." The state did not offer any contrary evidence, but objected to exhibits 1 and 2 introduced by Petitioner. The trial court sustained the state's objections to the introduction of the exhibits, and Petitioner made an offer of proof. (Tr. 101-108; 112-114).

During the trial, Deputy Wright for the first time revealed an alleged inconsistent statement of the Petitioner, which Deputy Wright asserted was made after Adams was confronted with the bag of marijuana. According to Deputy Wright, Adams stated that "he found it coming towards his farm on an off ramp going onto the highway with the Interstate 35." After additional direct examination, cross-examination, and redirect examination, Petitioner's counsel objected to the introduction of this testimony, moving to strike. During the discussions at the bench, the prosecutor admitted that the "evidence was absolutely unknown to me until the last day of last week." The trial court overruled the Petitioner's motions to strike and/or for a mistrial. (Tr. 200-209).

During closing argument, the prosecutor repeatedly relied upon this testimony to attack the Petitioner's credibility, particularly as it related to his knowledge of the

contraband nature of the contents of the bag. Petitioner's counsel objected to the use of these statements in this manner, but the trial court overruled all objections. (Appendix B at B-3 to 9).

In his motion for judgment of acquittal or motion for new trial, Petitioner reasserted the trial error with regard to the motion to suppress and the fundamental unfairness which resulted from the discovery violation. (Appendix C at C-5 to 9). On appeal, the Petitioner presented two points of error: one, that the motion to suppress should have been sustained because the arrest warrant was invalid and the arrest of Adams occurred upon the curtilage of the farm and because the officers did not have probable cause to believe that Adams was manufacturing marijuana; and two, that fundamental unfairness occurred as a result of the prosecutor's deliberate failure to disclose Adams' alleged inconsistent statement.

In responding to the first point of error, the state did not dispute Adams' contention that he was using the immobile van/trailer as a dwelling and that he was within the curtilage of the farm at the time of the arrest. In ruling against the Petitioner, the Court of Appeals stated as follows:

> Appellant's arrest was within the area immediately surrounding an immobile van which was described by the police as "like an old bread truck." Appellant testified that this van was his temporary residence on the farm. The state's evidence was that this was not a residence, but that it was used for storage purposes. The court was not required to find that appellant's arrest was within the curtilage of his

> home, thereby necessitating a warrant, under this evidence.
>
> A reviewing court is free to disregard contrary evidence and inferences and is to affirm the trial court's ruling on a motion to suppress if the evidence is sufficient to sustain the trial court's findings. *State v. Blair*, 691 S.W.2d 259, 260 (Mo.banc 1985), cert. dismissed, 480 U.S. 698 (1987).
>
> (Appendix A at A-8).

In both the Motion for Rehearing and/or Motion for Transfer and the Application for Transfer, Petitioner objected to the standard of review employed by the Court of Appeals, basically arguing that an appellate court is not "free" to disregard all evidence and inferences to the contrary and that the ruling must be supported by substantial evidence. (Appendix A at A-16 to 19; 32; 36 to 39). Petitioner also set forth the testimony of each officer with regard to their conclusions about the use of the van. (Appendix A at A-20 to 22).

As to the probable cause issue, the state court ruled as follows:

> At the hearing on appellant's motion to suppress, held on March 20, 1989, the state presented evidence sufficient to establish probable cause for a valid arrest without a warrant in the instant case. On September 22, 1988, Mike Heckenbach, a resident of Daviess County notified the Daviess County Sheriff's Office that marijuana was growing on the farm of appellant. The Sheriff's Office investigated the report and indeed found marijuana growing on the premises in what appeared "like a corn field," that had been harvested. There were tire tracks

> leading to the marijuana, and the plants appeared to be cultivated.
>
> (Appendix A at A-7).

In the Application for Transfer, the Petitioner basically argued that such facts were insufficient to permit a finding of probable cause to believe that *Adams* was manufacturing marijuana. (Appendix A at A-32 & 33; 39 to 41).

With regard to the second point, the state advanced several arguments, one of which involved the assertion that the prosecutor was not required to disclose such statements under the discovery rules. The state also contended that Adams failed "to state what, if anything he could have done differently had he known of Wright's testimony." In his reply brief, Adams responded to each of the state's arguments. The discovery rules were definitely violated. And Petitioner set forth two ways in which Petitioner's counsel would have altered his trial strategy, which in turn could have affected the outcome of the trial. (Appendix B at B-1 to 3).

The Court of Appeals initially ruled that a discovery violation had not occurred. (Appendix A at A-13). After the motions for rehearing were filed, the Court of Appeals modified its opinion, finding a discovery violation but ruling that fundamental unfairness did not occur. (Appendix A at A-10 to 12).

In the Application for Transfer, Petitioner relied upon the case of *United States v. Bagley*, 473 U.S. 667 (1985), requesting the Missouri Supreme Court to employ the standard of review therein and again pointing out the "blatant violation of the prosecutor's duties" and the

potential effect on the outcome of the trial. (Appendix A at A-33 and 34).

## REASONS FOR GRANTING THE WRIT

### I.

With regard to the first point, Petitioner respectfully submits that this Court should grant the Writ because the Missouri Supreme Court, and subsequent opinions from the Courts of Appeals, have employed a standard of review which conflicts with applicable decisions of this Court and the Eighth Circuit Court of Appeals. It also appears that the standard of reviewing a denial of a motion to suppress is not uniform and should be settled by this Court.

In *Ker v. California*, 374 U.S. 23 (1963), this Court generally recognized a standard for reviewing Fourth Amendment questions:

> As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. [Citations omitted]. While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental – i.e., constitutional – criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the

> practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.
>
> *Id.* at 33 and 34. *See also, Beck v. Ohio*, 379 U.S. 89, 92 (1964).

As to the "reasonableness" of the search, the *Ker* Court stated that it "is in the first instance for the [trial court] to determine . . . , thus indicating that the usual weight be given to findings of trial courts." *Id.* at 32.

In the Eighth Circuit, the Court of Appeals follows the "clearly erroneous standard of review":

> In reviewing the district court's determination made in the context of a motion to suppress, we apply the clearly erroneous standard of review. *United States v. Lewis*, 738 F 2d 916, 920 (8th Circuit 1984) *cert. denied*, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed. 2d 383 (1985). Under this standard, we affirm the decision of the district court unless it is not supported by substantial evidence, it reflects an erroneous view of the applicable law, or, upon review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *Id.; see also, United States v. Ross*, 713 F 2d 389, 392 (8th Cir. 1983).
>
> *United Stated v. Schoenheit*, 856 F. 2d 74, 76 [1] (8th Cir. 1988).

Missouri courts generally appear to follow the standard as set forth in *State v. Blair*, 691 S.W. 2d 259, 261 (Mo. banc 1985); *cert. dismissed*, 480 U.S. 698 (1987):

> First and foremost is the constitutional protection of citizens from unreasonable searches and seizures by requiring the authorities to secure a search warrant based on probable cause, "describing the place to be searched, or the person or thing to be seized. . . . " Mo. Const. art. 1, Section 15; U.S. Constitution, amendment IV. "[A]ll warrantless searches, subject only to a few well delineated exceptions, are per se constitutionally offensive." *State v. Peterson*, 525 S.W. 2d 599, 603 (Mo. App. 1975).
>
> Second is the case law-supported rule that upon review of a trial court's order, the facts, and reasonable inferences arising therefrom, are to be stated favorably to the order challenged on appeal. See *State v. Giffin*, 640 S.W. 2d 128, 130 (Mo. 1982).
>
> Third is the case law-supported rule that the reviewing court is free to disregard contrary evidence and inferences, and is to affirm the trial court's ruling on a motion to suppress if the evidence is sufficient to sustain its finding. *Giffin, supra; State v. Baskerville*, 676 S.W. 2d 527, 528 (Mo. App. 1984).

The appellate courts have not applied this standard consistently: the Western District Court of Appeals has twice ruled that this standard applies to interlocutory appeals by the state, *see, State v. Cross*, 757 S.W. 2d 613, 614 fn. 2 (Mo. App. W.D. 1988); *State v. Cochran*, 770 S.W. 2d 306, 310 (Mo. App. W.D. 1989); several other courts may have unduly emphasized the third portion of the

*Blair* standard,[1] while a few have recognized that the ruling must be supported by substantial evidence. *State v. Craig*, 759 S.W. 2d 377 (Mo. App. S.D. 1988) (appeal by state); *State v. Donohoe*, 770 S.W. 2d 252, 256 [5] (Mo. App. W.D. 1989).

Petitioner, in both his motion for rehearing and application for transfer, urged the courts to adopt a standard which, among other things, required substantial evidence to support the trial court's ruling. Although a reviewing court may view the facts and their inferences favorably to the order entered by the trial court as to the credibility of the witnesses, the reviewing court should not be permitted to "freely disregard contrary evidence and inferences". The state has the burden of proof to show the existence of an exception to the warrant requirement of the Fourth Amendment. *See, e.g., Vale v. Louisiana*, 399 U.S. 30, 34 (1970); MO. REV. STAT. Sec. 542.296.6. Thus, neither the reviewing court nor the trial court should be permitted to totally and arbitrarily reject uncontroverted evidence or an officer's positive testimony which sustains the defendant's position and/or invalidates the state's position. *See, State v. Cotterman*, 544 S.W. 2d 322, 327 (Mo.

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[1] In the following cases, the potential for this abuse is present because each court merely quoted the third rule. *See, State v. Singer*, 719 S.W. 2d 818, 821 [1] (Mo. App. W.D. 1968); *State v. Reynolds*, 753 S.W. 2d 1, 2 (Mo. App. W.D. 1988); *State v. Crow*, 755 S.W. 2d 754, 755 (Mo. App. E.D. 1988); *State v. Harrington*, 756 S.W. 2d 647, 649 [1] (Mo. App. E.D. 1988); *State v. McQuinn*, 761 S.W. 2d 668, 669 (Mo. App. E.D. 1988); *State v. Hernandez*, 776 S.W. 2d 34, 39 (Mo. App. S.D. 1989); *State v. Taylor*, 779 S.W. 2d 636, 643 [7] (Mo. App. W.D. 1989); *State v. Hunter*, 783 S.W. 2d 493, 494 [1] (Mo. App. W.D. 1990).

App. 1976); *State v. Peterson*, 525 S.W. 2d 599, 608 [12] (Mo. App. 1975); *cf., Recznik v. City of Lorain*, 393 U.S. 166, 169 (1968) (senior arresting officer's positive testimony that when he entered the apartment, he "had no evidence to make an arrest.")

As Petitioner pointed out to both the Western District Court of Appeals and Missouri Supreme Court, the record herein does not support a finding that the immobile van was only being used for storage. *All* of the officers concluded that the immobile van was also being used as a dwelling. In addition the state did not present any evidence to the contrary. And, if the immobile van was being used as a dwelling, the arrest occurred within the curtilage; thus, the arrest was unconstitutional in violation of *Payton v. New York*, 445 U.S. 573 (1980) and *Oliver v. United States*, 446 U.S. 170 (1984).

Permitting the *Blair* standard to be the standard of review when a defendant is appealing the denial of a motion to suppress is improper because it allows the reviewing court to affirm the ruling based upon little or no evidence. Without a requirement of substantial evidence to support the ruling, Fourth Amendment questions and in particular the reasonableness of a search, become entirely dependent upon the whims of the reviewing court. As the *Cotterman* Court recognized, "total rejection of the troopers' positive testimony that they did not stop or arrest defendant for violation of a traffic regulation would do violence to the principle that search and seizure questions are to be resolved in the 'concrete factual context of the individual case'." 544 S.W. 2d at 327. This Court has also warned that if "subjective good faith alone were the test, the protections of the

Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, 'only in the discretion of the police.'" *Beck v. Ohio*, 379 U.S. 89, 97 (1964). *See also, Ker, supra*. The courts are no different in this regard and, in fact, have a duty to prevent such abuses. *See, Mapp v. Ohio*, 367 U.S. 643, 647 (1961); *Peterson*, 525 S.W. 2d at 609 [13]. As in the *Mapp* case, a basic, uniform standard is necessary to prevent haphazard enforcement of Fourth Amendment protections.

II.

With regard to the second point, Petitioner respectfully submits that this Court should grant the Writ because the state court has failed to employ the most important constitutional rule for determining the existence of probable cause to arrest – the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that *the defendant*, a particular person, had committed or was committing an offense. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 91 (1964). Based on the facts relied upon by the state court, there is, *at best*, merely probable cause to believe that *someone* was manufacturing marijuana.

If the decision herein is permitted to stand, any landowner, whether present or absent, would be subject to immediate arrest if an officer concludes that even one marijuana plant "appears to be cultivated." Such a plant could also be located anywhere upon the property. As noted by the *Beck* Court, the subjective good faith of the

officer is not sufficient. *Id.* at 97. Such a standard would "leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.* at 91.

## III.

Since discovery violations are subject to a due process analysis under the 14th Amendment, *see, Pennsylvania v. Ritchie,* 107 S.Ct. 989, 1001 (1988), and since the standard employed in *United States v. Bagley,* 473 U.S. 667, 682 & 683 (1985) appears to be the controlling standard of review, discovery violations should involve an important federal question. In addition, depending upon the nature of the evidence, if the evidence is not disclosed until after the jury is selected, a defendant may be deprived of the right to an impartial jury because the defendant was deprived of the opportunity to question the jury about the effect of such evidence. Petitioner respectfully submits that the state court has ruled in such a manner herein as to violate the *Bagley* rules.

In Missouri, under Rules of Court 25.03 (A) (2), the state is required to disclose all of a defendant's statements, whether written, recorded, or oral. In its modified opinion, the state court recognized a violation herein, but ruled that fundamental unfairness did not occur because the result of the trial would not have been different. Although the state court did not cite the *Bagley* case, the standard in both cases is in part the same.

In the *Bagley* case, this Court enunciated the following standard of review:

> The evidence was material only if there is a reasonable probability that, had the evidence

> been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> 473 U.S. at 682.

With regard to specific requests, the *Bagley* Court further stated as follows:

> And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the Strickland formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. *The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.* (Emphasis added).
>
> *Id.* at 682 and 683.

Petitioner respectfully submits that the state court failed to give this latter rule any weight.

As noted in his reply brief, the Petitioner did attempt to show what he would have done differently had the prosecutor disclosed the inconsistent statement prior to

trial. Petitioner also asserted the following with regard to the possible effect upon the jury:

> Second, *voir dire* questioning would have been geared to determine whether a potential juror might be prejudiced by contradicting statements of the defendant or give undue weight to the deputy's assertions. Undoubtedly, some people are automatically prejudiced by such evidence. *Voir dire*, not midway through trial, is the proper time to question and discover such tendencies. (Appendix B at B-2 and 3).

Without additional discovery, the true effect of the statement is difficult to determine. However, there is no doubt that the Petitioner's counsel was, and that pretrial and trial strategies would be, affected.

The prosecutor did not reveal this statement until he called his last of five witnesses to testify, and he knew about this statement prior to trial. In addition, the prosecutor, when he endorsed the witness on the morning of trial, represented to Petitioner's counsel and the trial court that he had disclosed the substance of Deputy Wright's testimony to Petitioner's counsel in a response given long before the day of trial. Last, but not least, the prosecutor used this inconsistent statement to his fullest advantage, repeatedly relying on the inconsistency to show knowledge of the contraband nature of the contents of the bag. (Appendix B at B-4 to 9).

Contrary to the conclusions of the state court, the evidence was material, not "collateral". If the evidence in the *Bagley* case was material, *see*, *Bagley v. Lumpkin*, 798 F. 2d 1297 (9th Cir. 1986), then the evidence herein is even more so.

## CONCLUSION

For the reasons stated hereinbefore, Petitioner respectfully requests this Court to issue its Writ of Certiorari, granting a hearing before this Court or, in the alternative, vacating Petitioner's conviction and remanding this cause in light of the *Ker*, *Beck*, and/or *Bagley* cases, or any other case cited herein.

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## APPENDIX A

**Missouri Court of Appeals**

Western District

1300 Oak Street

Kansas City, MO. 64106-2970

Peggy Stevens McGraw Area Code 816 474-5511
Clerk-Docket Attorney

June 28, 1990

Re: State of Missouri v. Carl G. Adams
WD 42452

To Whom It May Concern:

This is to advise you that the Opinion in the above referenced cause, handed down on the 29th day of May, 1990, was on the 28th day of June, 1990, modified on the court's own motion. Modification begins with the last sentence in the third paragraph of page 9 and continues through the first full paragraph of page 11. Please substitute the attached pages 9 through 11 of the Opinion in lieu of the same numbered pages.

Peggy Stevens McGraw
Clerk-Docket Attorney

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

| | | |
|---|---|---|
| STATE OF MISSOURI, Respondent, | ) | No. WD 42452 |
| vs. | ) | OPINION |
| CARL G. ADAMS, Appellant. | ) | FILED: May 29, 1990 |

APPEAL FROM THE CIRCUIT COURT OF
LIVINGSTON COUNTY, MISSOURI
Honorable Stephen K. Griffin, Judge

BEFORE NUGENT, C.J., P.J., FENNER, J. and WASSERSTROM, SR. J.

Appellant, Carl G. Adams, appeals his conviction, after trial by jury, of felony possession of more than 35 grams of marijuana, in violation of § 195.020, RSMo 1986.

Taken in the light most favorable to the state, the evidence was that on September 24, 1988, appellant was arrested at a farm he owned by Daviess County Deputy Sheriff Bill Wright. Appellant was arrested on a warrant issued by the Daviess County Circuit Court, Associate Division, on September 23, 1988. The arrest warrant was issued pursuant to a felony complaint by the prosecuting attorney. Also present at the time of appellant's arrest were Missouri State Highway Patrol Trooper Robert Kimberling, Daviess County Deputy Sheriff Robert Smith and a female companion of appellant's by the name of Shirley Adkins.

After appellant was arrested, Trooper Kimberling asked appellant for permission to search a Plymouth

pickup truck that was present at the scene. Appellant stated that the truck belonged to Ms. Adkins. Trooper Kimberling then asked Ms. Adkins for permission to search the pickup and permission was granted.

Trooper Kimberling removed a gun and a black trash bag from behind the seat of the pickup. Trooper Kimberling also noticed a green leafy substance on the back portion of the seat of the pickup. The black trash bag was marked as evidence and submitted for laboratory analysis of its contents. The bag was found to contain marijuana.

After the bag was discovered, appellant told Deputy Sheriff Wright that he found the bag on an Interstate 35 off ramp. Sheriff Tom Houghton arrived on the scene after the other officers and appellant told him that he found the bag at the entrance to his field.

In his first point, appellant argues that the trial court erred by failing to suppress his statement and the bag containing marijuana. Appellant argues that the state's arrest warrant was invalid because it was based upon the conclusory statement of the prosecutor and not upon probable cause. Appellant argues the state did not have authority to enter upon his land and that the evidence taken by the state was inadmissible.

The original complaint of the prosecuting attorney herein named the court in which it was filed and the defendant. It was verified by the prosecutor and charged as follows:

> The Prosecuting Attorney of the County of Daviess, State of Missouri, charges that the defendant, in violation of Section 195.020,

> RSMo, committed the felony of manufacturing marihuana, a controlled substance, punishable upon conviction under Section 195.200.1(1), RSMo, in that on September 22, 1988, in the County of Daviess, State of Missouri, the defendant, produced marihuana by cultivating and encouraging the growth of marihuana, a controlled substance.[1]

Felony proceedings may be initiated by complaint filed in any court having original jurisdiction to try misdemeanors, or by indictment. Rule 22.01. Pursuant to Rule 22.02, a felony complaint must be in writing and contain 1) The name of the court, 2) the name of the accused, 3) the facts constituting the felony, and 4) verification by oath or affirmation of the complainant or signature by the prosecuting attorney on information and belief. Rule 22.02 does not require that the source of the information be disclosed in the complaint. The information need not be based upon affidavit of a person having actual knowledge of the offense, the information and belief of the prosecutor is enough. *State v. Brown,* 445 S.W.2d 647, 649 (Mo. App. 1969). Furthermore, Rule 22.03 provides that a felony warrant of arrest is to issue upon the filing of a complaint and a finding by the court that sufficient facts have been stated to show probable cause.

In the case at bar, there were no facts presented to the court issuing the arrest warrant to show probable cause. The arrest warrant was issued on nothing more than the

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[1] Appellant was subsequently charged with possession of marijuana, the offense for which he was convicted. However, it is the arrest warrant issued pursuant to the original complaint for manufacturing marijuana that appellant argues was invalid and the evidence obtained in relation thereto inadmissible.

complaint of the prosecuting attorney which merely contained the prosecutor's conclusion that appellant perpetrated the offense described in the complaint.

Appellant relies chiefly on the case of *Whiteley v. Warden, Wyoming State Penitentiary,* 401 U.S. 560 (1971), which holds that before a warrant for arrest can issue the judge issuing the warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant.

The State argues that *State v. Black,* 587 S.W.2d 865, 872 (Mo. App. 1979), and *State v. Reding,* 634 S.W.2d 552, 553 (Mo. App. 1982), support their position that the arrest warrant was valid without the presentation of facts to show probable cause. *State v. Reding* and *State v. Black* do not support the validity of the arrest warrant herein.

The court in *State v. Black* discussed the applicability of the holding in *Whiteley* to the then Missouri procedure, without addressing the constitutionality of the Missouri procedure in light of *Whiteley,* finding that the differences in the Missouri and Federal procedures were not meaningful to their case. Furthermore, at the time of the court's ruling in *State v. Black,* Rule 21.08 was the applicable Rule in regard to issuance of an arrest warrant and it did not require an independent finding of sufficient facts to show probable cause before a warrant could issue. As stated above, the currently applicable Missouri Rule of Court, Rule 22.03, requires an independent finding by the issuing court of sufficient facts to show probable cause that a felony has been committed by the defendant. Rule 22.03 is consistent with the holding in *Whiteley.*

The holding of the court in *State v. Reding* is pursuant to Rule 22.03 as currently in effect. In *State v. Reding*, 634 S.W.2d at 553, the court held that a judge signing an arrest warrant constitutes an implicit finding of probable cause that a defendant committed a felony in compliance with Rule 22.03. The holding of the court in *Reding* does not prohibit the defendant from being able to challenge that finding. *Reding* stands for the proposition that the issuance of a warrant implies a finding of record of probable cause. A defendant nonetheless has a right to challenge the court's finding to determine whether there were sufficient facts presented to the court to show probable cause.

There were not sufficient facts presented to the court in the case at bar, prior to the issuance of the arrest warrant, to show probable cause for the warrant. The warrant for appellant's arrest was invalid. It must therefore be determined if appellant's arrest was valid without a warrant.

An arrest can generally be made with or without a warrant if based upon probable cause, which simply means knowledge of facts and circumstances sufficient for a prudent person to believe that a suspect is committing or has committed an offense. *State v. Kroll*, 682 S.W.2d 78, 82 (Mo. App. 1984). However, a warrantless arrest in the arrestee's home is impermissible under the Fourth Amendment, absent consent to enter or exigent circumstances. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 236 (Mo. banc 1982) (citing *Payton v. New York*, 445 U.S. 573, 590 (1980).

The protection of the Fourth Amendment extends to the curtilage of a person's home. *State v. Stavricos*, 506 S.W.2d 51, 57 (Mo. App. 1974). "Curtilage" is defined as the inclosed [sic] space of ground and buildings immediately surrounding a dwelling house or as a yard, courtyard, or piece of ground, included within the fence surrounding a dwelling house. *State v. Egan*, 272 S.W.2d 719, 724 (Mo. App. 1954). Curtilage is a right which goes only with a dwelling house as that term is commonly used the understood. *Id.* Although a defendant is the owner of a given premises, those premises must be within the curtilage of the owner's home if they are to come within the protection of the Fourth Amendment. *Id.*

Probable cause to arrest is to be determined on the facts available for consideration by the agencies or officers participating in the arrest; and the collective knowledge and the available facts are the criteria in assessing probable cause. *State v. Young*, 701 S.W.2d 490, 495 (Mo. App. 1985). It is not necessary for the arresting or detaining officer to possess all of the available information. *Id.*

At the hearing on appellant's motion to suppress, held on March 20, 1989, the state presented evidence sufficient to establish probable cause for a valid arrest without a warrant in the instant case. On September 22, 1988, Mike Heckenbach, a resident of Daviess County notified the Daviess County Sheriff's Office that marijuana was growing on the farm of appellant. The Sheriff's Office investigated the report and indeed found marijuana growing on the premises in what appeared "like a corn field," that had been harvested. There were tire tracks leading to the marijuana, and the plants appeared to be cultivated.

Appellant's arrest was within the area immediately surrounding an immobile van which was described by the police as "like an old bread truck." Appellant testified that this van was his temporary residence on the farm. The state's evidence was that this was not a residence, but that it was used for storage purposes. The court was not required to find that appellant's arrest was within the curtilage of his home, thereby necessitating a warrant, under this evidence.

A reviewing court is free to disregard contrary evidence and inferences and is to affirm the trial court's ruling on a motion to suppress if the evidence is sufficient to sustain the trial court's findings. *State v. Blair,* 691 S.W.2d 259, 260 (Mo. banc 1985), cert. dismissed, 480 U.S. 698 (1987). Appellant's arrest was valid without a warrant and his argument that the evidence taken pursuant to his arrest was inadmissible is denied.

In his second point, appellant argues that the trial court erred by allowing the late endorsement of Deputy Sheriff Wright as a witness and in allowing Deputy Sheriff Wright to testify in regard to an inconsistent statement made by appellant to Deputy Wright. Appellant also argues under his second point that the trial court erred in allowing Sheriff Houghton to testify about evidence of marijuana found on appellant's property at an earlier point in time.

On the day of trial, Tuesday, August 15, 1989, the prosecutor requested leave of court to endorse Deputy Sheriff Bill Wright as a witness. The prosecutor advised the court that he had informed counsel for appellant in the latter part of the previous week that he would seek to

endorse Deputy Wright as a witness. The prosecutor further represented to the court that Deputy Wright's identity and the substance of his testimony were known to appellant since November of 1988. Appellant objected to Deputy Wright's endorsement as a witness, but declined the opportunity to interview Deputy Wright.

The trial court is vested with broad discretion in permitting the late endorsement of witnesses. *State v. Lamphier*, 745 S.W.2d 166, 170 (Mo. App. 1987). Absent an abuse of discretion by the trial court or prejudice to the defendant, a conviction should not be overturned because a witness was endorsed on the day of trial. *Id.*

Several factors are considered when evaluating whether the trial court abused its discretion in allowing the late endorsement of a witness. These factors include whether the defendant waived his objection, whether the State intended to surprise the defendant, acted deceptively or in bad faith with the intent to disadvantage the defendant, if the defendant was actually surprised and suffered any disadvantage, and whether the type of testimony given might have been readily contemplated. *Id.*

The trial court did not abuse its discretion in allowing Deputy Wright to be endorsed as a witness.

Appellant further argues that it was error for the trial court to refuse to declare a mistrial following Deputy Wright's testimony that appellant told him he found the trash bag containing marijuana in a different place from where appellant told Sheriff Houghton he found the bag. Deputy Wright testified that appellant said he found the bag on an off ramp to Interstate 35, while Sheriff Houghton testified that appellant told him he found the

bag at the entrance to his field. Appellant claims the state had a duty to disclose the statement made to Deputy Wright, but failed to do so, resulting in surprise and prejudice. Appellant argues that Deputy Wright's testimony was in violation of his request for discovery pursuant to Rule 25.03(A)(2), which requires, in pertinent part, that upon defendant's request the state shall provide the substance of any oral statements made by the defendants.

The purpose of the discovery rules is to enable a defendant to adequately prepare for trial. *State v. Lamphier*, 745 S.W.2d 166, 169 (Mo. App. 1987). The question of the remedy for violation of a discovery rule lies within the sound discretion of the trial court. A trial court's denial of a requested sanction is an abuse of discretion only where the admission of the evidence results in fundamental unfairness to the defendant. *State v. Kilgore*, 771 S.W.2d 57, 66 (Mo. banc 1989). Moreover, when counsel is surprised by opposing evidence at trial, but does not claim what he would have done differently had the state disclosed the information, such a lack of disclosure has no effect on the trial. *Id.*

Deputy Wright's testimony in regard to appellant telling him he found the marijuana on an off ramp to Interstate 35 was not provided to appellant in discovery. However, Deputy Wright testified that he did not remember the statement in question until just before trial. As pointed out previously, appellant declined the opportunity to interview Deputy Wright prior to his testimony. Furthermore, appellant made no specific objection to Deputy Wright's testimony when it was given at trial. After his initial objection to Deputy Wright being

endorsed as a witness, appellant did not object or request any relief for violation of discovery until after Deputy Wright was excused following cross-examination and re-direct examination.

Appellant does not claim what, if anything, he would have done differently had Deputy Wright's testimony, regarding the place where appellant told him he found the marijuana, been disclosed prior to trial. Finally, appellant was charged and convicted of possession of marijuana and where appellant obtained the marijuana is a collateral matter.

The admission of Deputy Wright's testimony did not result in fundamental unfairness to appellant and the trial court did not abuse its discretion by allowing Deputy Wright to testify.

Appellant further complains that Sheriff Houghton "exceeded the scope of counsel's questions, mentioning the presence of some marijuana found 'on [appellant's] place earlier.' "

Although evidence of other crimes is generally inadmissible, such evidence is admissible to prove the crime charged when it tends to establish motive, intent, absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or identity of the person charged with the commission of the crime. *State v. Fraction*, 782 S.W.2d 764, 768 (Mo. App. 1989). Evidence of other crimes should be admitted under one of these exceptions only when the prejudicial effect of the evidence is outweighed by its probative value. *State v. Mallett*, 732 S.W.2d 527, 534 (Mo. banc 1987), *cert. denied*,

484 U.S. 933 (1987). This balancing of prejudicial effect and probative value lies within the sound discretion of the trial court. *Id.*

If evidence of another crime tends to show intent in the present instance, that evidence is admissible. *State v. Rose*, 727 S.W.2d 919, 921 (Mo. App. 1987).

In the case at bar the state was required to prove that appellant possessed marijuana, knew that he possessed marijuana, and that he was aware of the nature and character of the marijuana in his possession. MAI-CR3d 332.06.2. There was no abuse of discretion by the trial court overruling appellant's objection to the testimony of Sheriff Houghton.

The judgment of the trial court is affirmed.

All concur.

GARY A. FENNER, JUDGE

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Several factors are considered when evaluating whether the trial court abused its discretion in allowing the late endorsement of a witness. These factors include whether the defendant waived his objection, whether the State intended to surprise the defendant, acted deceptively or in bad faith with the intent to disadvantage the defendant, if the defendant was actually surprised and suffered any disadvantage, and whether the type of testimony given might have been readily contemplated. *Id.*

The trial court did not abuse its discretion in allowing Deputy Wright to be endorsed as a witness.

Appellant further argues that it was error for the trial court to refuse to declare a mistrial following Deputy Wright's testimony that appellant told him he found the trash bag containing marijuana in a different place from where appellant told Sheriff Houghton he found the bag. Deputy Wright testified that appellant said he found the bag on an off ramp to Interstate 35, while Sheriff Houghton testified that appellant told him he found the bag at the entrance to his field. Appellant claims the state had a duty to disclose the statement made to Deputy Wright, but failed to do so, resulting in surprise and prejudice. Appellant argues that Deputy Wright's testimony was in violation of his request for discovery pursuant to Rule 25.03.

Rule 25.03 only requires the prosecutor to disclose to defendant's counsel, upon written request, the names and addresses of persons the state intends to call as witnesses, written statements, or memoranda summarizing oral statements. *State v. Motley*, 740 S.W.2d 313, 319 (Mo. App. 1987).

The record does not support appellant's argument that he was entitled to a mistrial as a result of Deputy Wright's testimony. Appellant was provided with the identity of Deputy Wright in November, 1988, and Deputy Wright's testimony was not recorded in any written statement or memoranda summarizing an oral statement. No discovery violation occurred.

Appellant also complaint that Sheriff Houghton "exceeded the scope of counsel's questions, mentioning

the presence of some marijuana found 'on [appellant's] place earlier.' "

Although evidence of other crimes is generally inadmissible, such evidence is admissible to prove the crime charged when it tends to establish motive, intent, absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or identity of the person charged with the commission of the crime. *State v. Fraction*, 782 S.W.2d 764, 768 (Mo. App. 1989). Evidence of other crimes should be admitted under one of these exceptions only when the prejudicial effect of the evidence is outweighed by its probative value. *State v. Mallett*, 732 S.W.2d 527, 534 (Mo. banc 1987), *cert. denied*, 484 U.S. 933 (1987). This balancing of prejudicial effect and probative value lies within the sound discretion of the trial court. *Id.*

If evidence of another crime tends to show intent in the present instance, that evidence is admissible. *State v. Rose*, 727 S.W.2d 919, 921 (Mo. App. 1987).

In the case at bar the state was required to prove that appellant possessed marijuana, knew that he possessed marijuana, and that he was aware of the nature and character of the marijuana in his possession. MAI-CR3d 332.06.2. There was no abuse of discretion by the trial court overruling appellant's objection to the testimony of Sheriff Houghton.

The judgment of the trial court is affirmed.

All concur.

GARY A. FENNER, JUDGE

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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| STATE OF MISSOURI, | ) | |
| RESPONDENT, | ) | |
| VS. | ) | No. WD 42452 |
| CARL G. ADAMS, | ) | |
| APPELLANT. | ) | |

MOTION FOR REHEARING OR, IN THE ALTERNATIVE, MOTION FOR TRANSFER TO SUPREME COURT
(Filed June 1, 1990)

COMES NOW the Appellant, by and through his attorneys, pursuant to Missouri Rules of Court 30.26 and 30.27, and respectfully requests this Court to rehear this case because, as shown by its opinion, the Court has overlooked or misinterpreted matters of law and fact. In the alternative, Appellant respectfully requests this Court to transfer this case to the Supreme Court because the questions involved in this case are of general interest or importance or require a re-examination of law and because this opinion is contrary to previous decision of an appellate court of this state and of the United States Supreme Court.

WHEREFORE, for the reasons stated herein and in the attached Suggestions in Support, the Appellant requests this Court to issue an order rehearing this case or, in the alternative, transferring this case to the Supreme Court, and for such other relief as this Court deems just.

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BY: Bruce B. Brown

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ATTORNEYS FOR APPELLANT

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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| STATE OF MISSOURI, | ) | |
| RESPONDENT, | ) | |
| VS. | ) | No. WD 42452 |
| CARL G. ADAMS, | ) | |
| APPELLANT. | ) | |

## SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING OR, IN THE ALTERNATIVE, MOTION FOR TRANSFER TO SUPREME COURT

COMES NOW the Appellant, by and through his attorneys, and submits these suggestions in support of motion for rehearing or, in the alternative, motion for transfer to Supreme Court:

1. Point One: Op. 2-8

   a. Standard of Review

On page 7 of the Opinion, this Court cites the *Blair* case for its standard of review. Appellant respectfully

submits that the Court has either applied the wrong standard or has misapplied the *Blair* standard of review.

In *State v. Cross*, 757 S.W.2d 613 (Mo. App. W.D. 1988), this Court recognized that the *Blair* standard applied to appeals by the state as authorized by Sec. 547.200, RSMo 1986. *Id.* at 614, fn.2. While other cases involving appeals by a defendant cite the *Blair* case, *see, e.g., State v. Donohoe*, 770 S.W.2d 252, 256 [5] (Mo. App. W.D. 1989), the standard of review is significantly different:

> A motion to suppress under Sec. 542.296 presents the issue of the admissibility in a criminal proceeding of evidence seized by police action, and so is collateral to the question of guilt or innocence of the defendant, which is tried independently. *State v. Yowell*, 513 S.W.2d 397, 402 [1,2] (Mo. banc 1974). It is for that reason that an appellate review – although further evidence on the issue is not foreclosed – the transcript of the proceedings on the motion is the essential determinant of the validity of the trial court disposition of the issue of admissibility. *Settle v. State*, 679 S.W.2d 310, 313 (Mo.App.1984), *cert denied*, 472 U.S. 1007, 105 S.Ct. 2701, 86 L.Ed.2d 717 (1985). On review we confine inquiry to whether that decision rests on substantial evidence. *State v. Johns*, 679 S.W.2d 253, 261 [9,10] (Mo. banc 1984), *cert. denied*, 470 U.S. 1034, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985). In that determination, we give regard to the opportunity of the trial court to assess the credibility of the witnesses [*State v. Boggs*, 634 S.W.2d 447, 453 [4,5] (Mo. banc 1982)], and consider the facts and their inferences favorably to the order entered by the trial court. *State v. Blair*, 691 S.W.2d 259, 260 [1] (Mo. banc 1985), *cert. granted*, 474 U.S. 1049, 106 S.Ct. 784, 88 L.Ed.2d

762 (1986), *cert. dismissed*, 480 U.S. 698, 107 S.Ct. 1596, 94 L.Ed.2d 678 (1987).

*Donohoe*, 770 S.W.2d at 256.

Notably missing from this standard is the rule that a "reviewing court is free to disregard contrary evidence and inferences". While an appellate court defers to the trial court's assessment of the credibility of the witnesses and considers the facts and their inferences favorably to the order entered by the trial court, the trial court's decision must be supported by substantial evidence.

Appellant further submits that the standard of review also includes another rule. Although an appellate court "does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental – i.e., constitutional – criteria established by this Court have been respected." *Ker v. California*, 374 U.S. 23, 34; 83 S.Ct. 1623, 1630 [13,14] (1963); *Beck v. Ohio*, 379 U.S. 89, 92; 85 S.Ct. 223, 226 [4] (1964). The evidence from both the motion to suppress and the trial are to be considered. *Carroll v. United States*, 267 U.S. 132, 162; 45 S.Ct. 280, 288 [10] (1925); *State v. Hohensee*, 473 S.W.2d 379, 380 [1] (Mo. 1971). *State v. Trimble*, 654 S.W.2d 245, 254 [10] (Mo.App. S.D. 1983). And the burden rests upon the state to show the existence of an exception to the warrant requirements of the Fourth Amendment. *See, e.g., Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Blair*, 691 S.W.2d at 260:

> *First and foremost* is the constitutional protection of citizens from unreasonable searches

> and seizures by requiring the authorities to secure a search warrant based on probable cause, "describing the place to be searched, or the person or thing to be seized. . . . " Mo. Const. art. 1, Sec. 15; U.S. Const., amend. IV. "[A]ll warrantless searches, subject only to a few well delineated exceptions, are per se constitutionally offensive." *State v. Peterson*, 525 S.W.2d 599, 603 (Mo. App.1975). (Emphasis added).

The Court should also note that in the *Peterson* case, this Court set forth several important rules of law which enunciate the responsibilities of all courts to uphold the Fourth Amendment and the burden upon the state to produce substantial evidence to show the existence of an exception to the Fourth Amendment.

b. Curtilage Issue: Op. 7

In deciding this issue against the Appellant, the Court ruled that the immobile van was not a residence, but instead was merely a storage facility. Appellant respectfully submits that such a finding is not supported by substantial evidence.

First, in Appellant's Brief, the Appellant stated as follows:

> In the case at bar, the trailer/immobile van is the home on the farm. Adams testified that he lived and stored personal property there. All of the officers regarded the trailer as a dwelling. Therefore, the trailer becomes the focal point from which the curtilage can be ascertained.

The Respondent did not in any manner challenge the Appellant's argument on this issue.

Second, the testimony of the State's own witnesses supports Appellant's argument that the immobile van was being used as a residence. Trooper Kimberling testified as follows:

> Q. Well, what did you first see about the premises then?
>
> A. Well, just noticed the – the old van truck *or whatever,* it is that they use for a storage like – *I assume it's storage,* and then the barn and I don't know – really recall just all it was, just some buildings around there. Maybe some out buildings or something.
>
> (Tr. 14, Lines 6-11) (Emphasis added).
>
> * * *
>
> Q. Well, this has been referred to as being used as a temporary residence or something?
>
> A. Something, whatever.
>
> (Tr. 14, Lines 24 & 25; 15, Line 1).
>
> * * *
>
> Q. Weren't you able to ascertain that that's what Mr. Adams used *as his dwelling* when he was up there?
>
> A. Yeah. *Yes.* The deputy, I believe, determined that, yes.
>
> Q. Well, you made a decision about it. It's also *a dwelling;* wasn't it?
>
> A. *Yes,* I guess.
>
> (Tr. 137, Lines 16-21). (Emphasis added).
>
> * * *
>
> Q. Did you have some further conversation then after you went back up there to the defendants and up near the *dwelling house* as this all

took place by this little old truck or whatever it was *they used to live in;* right?

A. (Witness nods head up and down.)

(Tr. 142, Lines 13-17). (Emphasis added).

* * *

Q. Then we made sure that we were aware of where all weapons were. The sheriff arrived shortly thereafter and he and one of the deputies looked in the van, *the living quarters,* and I went down to check out the shotgun in the pickup truck.

That was your answer; wasn't it?

A. Yes.

(Tr. 198, Lines 14-21) (Emphasis added).

Deputy Smith apparently did not look inside the van, but concluded that the area immediately surrounding the immobile van was a yard. (Tr. 90). Sheriff Houghton also concluded that this area was a yard and further stated as follows:

Q. Now, that was the only place that you found any contraband material; wasn't it, or which you thought might be contraband? You searched other buildings, searched the *dwelling house*?

A. There was –

Q. Searched the barn?

A. There was none in the other dwellings, *the dwelling house.* We had found marijuana on his place earlier.

(Tr. 198, Lines 14-21) (Emphasis added).

Deputy Wright also concluded that the immobile van was being used as a residence:

> A. At the time we found out Mr. Adams was at his place of *residence,* I believed the dispatcher called for the highway patrol and they was sending an Officer 511 to meet me at that time. He met me about a quarter of a mile north of the Adams farm. At that time we decided we would go on down. So Officer 511 and myself went to the *residence* where Mr. Adams was at and parked our cars and walked up through the *yard* to there, where they were standing.
>
> (Tr. 44, Lines 3-11) (Emphasis added).

Third, the Appellant raised this issue in his Suggestions in Support of Motion to Suppress (S.L.F. 7), and the prosecutor did not directly challenge such an argument. (S.L.F. 13). The state also failed to controvert Adams' testimony about his use of the immobile van and area around it. *See, Peterson,* 525 S.W.2d at 608 [12] (Where defendant's father testified that basement "room" rented and occupied by defendant was exclusively the defendant's area and no one else had a right to be there, and State made no effort to counter this evidence, warrantless search would not be determined to fall within consensual exception to Fourth Amendment's admonition against unreasonable searches).

While a trial court has the right to disbelieve a defendant's evidence, in light of the uncontroverted evidence from Adams and the officers' candid admissions, rejection of such evidence should be prohibited. Appellant would also refer this Court to the case of *State v. Cotterman,* 544 S.W.2d 322 (Mo.App. K.C.D. 1976) wherein this Court recognized that "total rejection of the troopers'

positive testimony that they did not stop or arrest defendant for violation of a traffic regulation would do violence to the principle that search and seizure questions are to be resolved in the 'concrete factual context of the individual case.' " *Id.* at 327. Likewise, this Court's total rejection of this positive testimony of all of the officers would do violence to our system of justice, not only by violating the aforesaid principle, but also by shifting the burden of proof to a defendant contrary to Sec. 542.296.6.

In summary, while the immobile van may have in the past been "like an old bread truck", the evidence showed that it had been converted into a residence and was being used for living quarters *and* for storage purposes. A yard existed around the immobile van. And, as reflected in D.E. 2, the area immediately surrounding the immobile van was being utilized in a manner consistent with home uses. All of these uses are associated with the "intimate activities of a home".

Therefore, the immobile van is a home for constitutional purposes, and Adams was located within the curtilage at the time of his arrest. Because the warrant was invalid, the officers' entry upon the curtilage and their subsequent conduct was unconstitutional.

2. Point Two: Op. 8-11

This Court begins its discussion of this point by stating "appellant argues that the trial court erred by allowing the late endorsement of Deputy Sheriff Wright as a witness . . . " Appellant respectfully submits that the Court has misconstrued this portion of his argument. Appellant does not challenge the late endorsement *per se*,

but does take issue with and "finds disturbing the fact that the prosecutor endorsed Deputy Wright on the day of trial with prior knowledge about Deputy Wright's allegedly sudden recovery from his amnesia problems (App. Br. 23) and that the prosecutor failed to disclose such material evidence to defense counsel at a time when a request for a continuance was practical." App. R. Br. 9 & 10.

This Court also appears to have overlooked the fact that Appellant first asked the trial court to strike the disputed testimony of Deputy Wright and then asked for a mistrial when the trial court overruled Appellant's objection. In addition, contrary to this Court's assertions, a discovery violation occurred because Rule 25.03 (A) (2) requires the State to disclose a defendant's statements, whether written, recorded, or oral:

> * * * * the state shall, upon written request of defendant's counsel, disclose to defendant's counsel *such part or all* of the following material and information *within its possession or control* designated in said request:
>
> Any written or recorded statements *and the substance of any oral statements* made by the defendant or by a co-defendant, a list of all witnesses to the making, and a list of all witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses. (Emphasis added).

Appellant would also refer this court to the cases of *State v. Helm*, 755, S.W.2d 256, 258 [1] (Mo.App. W.D. 1988); *State v. Perkins*, 710 S.W.2d 889 (Mo.App. E.D. 1986), wherein these courts recognized a discovery violation

when the state failed to produce statements of the defendants prior to trial.

Respectfully submitted,

BROWN & BROWN

BY: Bruce B. Brown

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ATTORNEYS FOR APPELLANT

Copy of Motions and Suggestions
mailed this 1st day of June, 1990 to
John Morris, Office of Attorney General,
P.O. Box 899, Jefferson City, MO. 65102.

/s/ Bruce B. Brown
BRUCE B. BROWN

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

| | | |
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| STATE OF MISSOURI, Respondent, | ) | |
| vs. | ) | No. 42452 |
| CARL G. ADAMS, Appellant. | ) | |

MOTION TO MODIFY OPINION
IN LIEU OF REHEARING

Comes now the State of Missouri, by William L. Webster, Attorney General, and Robert P. Sass, Assistant Attorney General, and respectfully submits as follows:

1. That on September 18, 1989, appellant herein Carl. G. Adams filed his notice of appeal with this Court;

2. That on February 22, 1990, appellant, through his attorney Roy W. Brown, filed his brief;

3. That on April 27, 1990, respondent filed its brief;

4. That on May 7, 1990, appellant filed his reply brief;

5. That on May 9, 1990, the cause was submitted after oral argument to Division IV of this Court;

6. That on May 29, 1990, appellant's conviction and sentence were affirmed by this Court;

7. That on June 1, 1990, appellant filed a motion for rehearing, or in the alternative transfer to the Supreme Court;

8. Respondent submits that its brief inadvertently contained a misstatement of the law in that it incorrectly stated that Supreme Court Rule 25.03 did not require the substance of appellant's oral statement to Deputy Wright to be disclosed. Supreme Court Rule 25.03(A)(2) appears to hold otherwise.

9. While respondent concedes that a technical violation of the above rule seems to have occurred, no fundamental unfairness resulted to appeal. Thus while this Court's affirmance in this matter should not change, its opinion should be modified to reflect the foregoing.

WHEREFORE, respondent respectfully requests that this Court modify its opinion in lieu of a rehearing.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

/s/ Robert P. Sass
ROBERT P. SASS
Assistant Attorney General
Mo. Bar No. 37484

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 13th day of June, 1990, to:

Roy Brown
Box 679
Kearney, MO 64060
(816) 635-6100

/s/ Robert P. Sass
ROBERT P. SASS

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | |
| | ) | |
| Respondent, | ) | |
| vs. | ) | No. 42452 |
| | ) | |
| CARL G. ADAMS, | ) | |
| | ) | |
| Appellant. | ) | |

SUGGESTIONS IN SUPPORT OF RESPONDENT'S MOTION TO MODIFY OPINION IN LIEU OF REHEARING

Respondent recognizes that the state did not fully comply with Supreme Court Rule 25.03(A)(2). Said rule states that upon defendant's request the state shall provide the substance of any oral statements made by the defendant.

However, in dealing with discovery violations, the courts have consistently looked at whether the appellant was prejudiced by the alleged nondisclosure; the trial court will be reversed only when fundamental unfairness results *State v. Griffin*, 692 S.W.2d 314 (Mo.App., E.D. 1985). Moreover, when counsel is surprised by opposing evidence at trial, but does not claim what he would have done differently had the state disclosed the information, such a lack of disclosure has no effect on the trial. *State v. Kilgore*, 771 S.W.2d 57, 66 (Mo. banc 1989).

In the case at bar, appellant does not claim what if anything he could have done differently had Deputy Wright's testimony regarding the place where appellant stated that he found the marijuana been disclosed. Indeed it is probative of the fact that appellant suffered no actual

prejudice by the fact that he did not request a continuance. Continuance is the proper remedy for surprise *State v. Brass*, 781 S.W.2d 565 (Mo.App., E.D. 1989). By failing to ask for a continuance, appellant has failed to preserve the issue of surprise. *Id.* Appellant could also have discovered Wright's testimony simply by interviewing him before he testified. Appellant was given the chance to do so, but inexplicably he refused (Tr. 100). Moreover, appellant himself knew that he had given inconsistent statements to Sheriff Houghton and Deputy Wright, "the state cannot be faulted for nondisclosure if the defendant has knowledge of such evidence." *State v. Parry*, 684 S.W.2d 441 (Mo.App., E.D. 1984).

Finally, the admission of Deputy Wright's testimony did not prejudice appellant, because the essence of the offense appellant was charged with was possession. Appellant was clearly guilty of knowingly possessing marijuana. Thus where he allegedly found the marijuana was an immaterial and insignificant detail.

In conclusion, while respondent concedes that the state should have provided appellant with the substance of appellant's oral statement to Deputy Wright, it is clear that appellant suffered no fundamental unfairness. Thus while the same result should obtain, this Court's opinion should be modified to reflect the foregoing.

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Missouri Court of Appeals
Western District
1300 Oak Street
KANSAS CITY, MO. 64106-2970
AREA CODE 816 474-5511

PEGGY STEVENS McGRAW
CLERK-DOCKET ATTORNEY

JULY 3, 1990

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: STATE OF MISSOURI VS. ADAMS, CARL

WD# 42452

PLEASE BE ADVISED THAT APPELLANT'S MOTION FOR REHEARING IS OVERRULED AND TRANSFER TO SUPREME COURT DENIED. MOTION TO MODIFY OPINION IS OVERRULED. OPINION MODIFIED ON COURT'S OWN MOTION.

PEGGY STEVENS MCGRAW
CLERK-DOCKET ATTORNEY

CC: JOHN MORRIS
ROY BROWN✔

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | Case No. ___ |
| Respondent | ) | |
| | ) | No. WD 42452 |
| vs. | ) | |
| CARL G. ADAMS, | ) | OPINION FILED: |
| | ) | |
| Appellant. | ) | May 29, 1990 |

APPLICATION FOR TRANSFER TO SUPREME COURT

COMES NOW the Appellant, by and through his attorneys, pursuant to Missouri Rules of Court 83.03 to 83.05, and respectfully requests this Court to transfer this cause for any one or combination of the following reasons: one, general interest or importance; two, the opinion of the court of appeals is contrary to previous decisions of the appellate courts of this state; or three, for the purpose of reexamining the existing law. In support hereof, Appellant states as follows:

1. On March 29, 1990, the Court of Appeals issued an opinion, affirming Appellant's conviction. (Op.). On June 1, 1990, the Appellant filed his motion for rehearing or, in the alternative, motion for transfer (M.R.). On June 14, 1990, the Respondent filed a counter motion with suggestions. On June 28, 1990, the Court of Appeals partially modified its original position, this time recognizing a violation of the discovery rules, but ruling that fundamental unfairness did not occur. (M.Op.). On July 3, 1990, the Court of Appeals overruled and denied Appellant's motions.

2. On appeal, the Appellant raised two points of error. The first involved the trial court's failure to sustain the motion to suppress for three reasons: one, the arrest warrant was invalid; two, appellant was within the curtilage portion of his farm at the time of the arrest; and three, regardless of the validity of the arrest warrant and the location of the arrest, the officers did not have probable cause to believe the Appellant was manufacturing marijuana. The second point involved the State's intentional failure to disclose an alleged statement made by him which wholly contradicted a disclosed statement of Adams regarding where he found the bag of marijuana.

3. With regard to the first issue, the Court of Appeals found the arrest warrant to be invalid because it was not supported by facts constituting probable cause. (*Op.* at 2-5). However, the Court of Appeals ruled that Adams was not upon any curtilage at the time of the arrest because the immobile van was not being used as a dwelling. (*Op.* at 7 & 8).

As more fully explained in the suggestions in support, Appellant respectfully submits that the curtilage issue involves all three reasons for accepting transfer. The Court of Appeals, as well as numerous other courts, has improperly applied the *Blair* standard of review. An appellate court is not "free to disregard" the evidence and can affirm the trial court's judgment only if supported by substantial evidence. Herein, none of the evidence supports the conclusion that the immobile van was only being used for storage.

With regard to the probable cause issue, the actual holding herein is probably one of first impression. The

Court of Appeals has cited three facts which it concludes are sufficient. (Op. at 7). Appellant respectfully submits that these facts would at most constitute a mere suspicion that the owner is manufacturing marijuana. If permitted to stand, every farmer or anyone who owns some acreage would be subject to immediate arrest if marijuana is growing on their property.

4. As to the second issue, the Court of Appeals originally ruled that no discovery violation occurred. (Op. 9). After again pointing out the particular rule violated [Rule 25.03(a)(2)], the State and the Court of Appeals acknowledged the occurrence of a violation (M.Op. 9-11). However, Appellant respectfully submits that the Court of Appeals has mischaracterized and ignored the evidence showing that, had the evidence been disclosed, a reasonable probability existed for the result of the trial to have been different.

Appellant flatly accuses the prosecutor of intentionally concealing the other alleged statement. Contrary to the Court of Appeals' conclusion, the statement is not "collateral" (M.Op. at 11), but is material in that it impeaches Adams' credibility. At the trial, the issue about Adams' awareness of the nature and character of the substance, an essential element of the offense, was either supported by circumstantial or very weak evidence. In closing argument, the prosecutor vigorously used the discrepancy to question Adams' credibility as it related to this issue.

The prosecutor knew about this statement when he endorsed Deputy Wright and did not reveal the statement to the Appellant. The Appellant's counsel did not seek an

interview with the deputy because prior discovery did not disclose this statement and, in good faith, Appellant's counsel relied upon the silence of the prosecutor. Had Appellant known about the statement, he would have requested a continuance to conduct further discovery. Appellant refers this Court to the case of *United States v. Bagley*, 473 U.S. 667, 682-684 (1985) for the standard of review. This Court should particularly note the *Bagley* Court's discussion of the effect of a failure to disclose specifically requested evidence.

Without additional discovery, it is difficult to determine exactly what the Appellant would have done differently. At the very least, Appellant would have explored the effect of this discrepancy during *voir dire* examination to determine the potential prejudices of the venirepersons. Any or all of the 12 jurors could have used this discrepancy as a basis for finding Adams guilty. This Court should not condone such a blatant violation of the prosecutor's duties, *see, e.g., State v. Beck*, 745 S.W.2d 205, 209 & 210 (Mo.App. E.D. 1987), and should give Appellant the benefit of the doubt, reversing the conviction and remanding for a new trial so that Appellant can conduct further discovery.

5. The Appellant will further examine the importance of the first issue in the suggestions in support.

WHEREFORE, for the reasons set forth herein and in the suggestion in support, the Appellant respectfully requests this Court to transfer this cause, and for such other relief as this Court deems just.

BROWN & BROWN

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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| STATE OF MISSOURI, | ) | |
| | ) | |
| Respondent | ) | No. WD 42452 |
| vs. | ) | |
| | ) | OPINION FILED |
| CARL G. ADAMS, | ) | |
| | ) | |
| Appellant. | ) | May 29, 1990 |

SUGGESTIONS IN SUPPORT OF
APPLICATION FOR TRANSFER
TO SUPREME COURT

COMES NOW the Appellant, by and through his attorneys, and submits these suggestions in support of application for transfer to Supreme Court:

1. Curtilage Issue

In ruling upon this issue, the Court of Appeals stated as follows:

> Appellant's arrest was within the area immediately surrounding an immobile van which was described by the police as "like an old bread truck." Appellant testified that this van was his temporary residence on the farm. The state's evidence was that this was not a residence, but that it was used for storage purposes. The court was not required to find that appellant's arrest was within the curtilage of his home, thereby necessitating a warrant, under this evidence.
>
> A reviewing court is free to disregard contrary evidence and inferences and is to affirm the trial court's ruling on a motion to suppress if the evidence is sufficient to sustain the trial court's findings. *State v. Blair*, 691 S.W.2d 259, 260 (Mo.banc 1985), cert. dismissed, 480 U.S. 698 (1987).

Appellant respectfully submits that the Court of Appeals has improperly disregarded the evidence as to the use of the immobile van and has either applied the wrong standard of review or has misapplied such standard.

As pointed out in the briefs and Appellant's suggestions in support of the motion for rehearing, not only did Appellant present evidence about his use of the immobile van as a dwelling, but the State's own evidence fully supported this assertion. Every officer who looked at or into the immobile van formed an opinion that the immobile van was being used as living quarters. (M R. 4-6). In addition, the State did not challenge Appellant's assertions as to the use of the trailer in either the motion to suppress or in its belief on appeal.

a. Application of Improper Standard of Review

In *State v. Blair*, 691 S.W.2d 259 (Mo.banc 1985), a case involving an appeal by the state, this Court enunciated a three-part standard of review. *Id.* at 260. This standard has since been applied in numerous cases in one form or another, but in *State v. Cross*, 757 S.W.2d 613, 614 fn.2. (Mo.App. W.D. 1988), and *State v. Cochran*, 770 S.W.2d 306, 310 (Mo.App. W.D. 1989), the courts recognized that the *Blair* standard applied to interlocutory appeals by the state as authorized by Section 547.200. To Appellant's knowledge, in those cases involving an appeal by the defendant, no court has raised this issue, instead only applying the third part of the *Blair* standard.

As also noted in Appellant's motion for rehearing, applying the third rule of the *Blair* standard is improper in cases wherein the defendant appeals an adverse ruling. (M.R. 2-4). *See, State v. Donohoe*, 770 S.W.2d 252, 256[5] (Mo.App. W.D. 1989); *State v. Johns*, 679 S.W.2d 253 (Mo.banc 1984); *Ker v. California*, 374 U.S. 23, 34; 83 S.Ct. 1623, 1630[13, 14](1963); *Beck v. Ohio*, 379 U.S. 89, 92; 85 S.Ct. 223, 226[4](1964). Notably missing from these cases is the right of the appellate court to "freely" disregard contrary evidence and inferences. In addition, the trial court's judgment must be supported by substantial evidence, not merely "sufficient" evidence. *Compare, State v. Craig*, 759 S.W.2d 377 (Mo.App. S.D. 1988), a case involving an appeal by the state, wherein the Court (Holstein, Chief Judge) reversed the trial court's ruling because there was no substantial evidence to support the judgment.

b. Misuse of Blair Standard

In the case at bar, the Court of Appeals has emphasized the third rule of the *Blair* standard to the exclusion of the first rule.[1] In the first rule, this Court cites the case of *State v. Peterson*, 525 S.W.2d 322 (Mo.App. 1976). That court, as well as the court in the case of *State v. Cotterman*, 544 S.W.2d 322 (Mo.App. 1976), recognized that the state has the burden to prove an exception to the warrant requirement and that the courts cannot totally reject uncontroverted evidence or an officer's positive testimony which sustains the defendant's position and/or invalidates the state's position. *Peterson*, 525 S.W.2d at 608[12]; *Cotterman*, 544 S.W.2d at 327. The *Cotterman* Court further warned that "total rejection of the troopers' positive testimony that they did not stop or arrest defendant for violation of a traffic regulation would do violence to the principle that search and seizure questions are to be resolved in the 'concrete factual context of the individual case'." 544 S.W.2d at 327.

By completely disregarding the facts and concluding that the immobile van was not being used by Adams as a

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[1] In the following cases, the potential for this abuse is present because each court merely quoted the third rule. *See, State v. Singer*, 719 S.W.2d 818, 821[1](Mo.App. W.D. 1968); *State v. Reynolds*, 753 S.W.2d 1, 2 (Mo.App. E.D. 1988); *State v. Crow*, 755 S.W.2d 754, 755 (Mo.App. E.D. 1988); *State v. Harrington*, 756 S.W.2d 647, 649[1](Mo.App. E.D. 1988); *State v. McQuinn*, 761 S.W.2d 668, 669 (Mo.App. E.D. 1988); *State v. Hernandez*, 776 S.W.2d 34, 39 (Mo.App. S.D. 1989); *State v. Taylor*, 779 S.W.2d 636, 643[7](Mo.App. W.D. 1989); *State v. Hunter*, 783 S.W.2d 493, 494[1](Mo.App. W.D. 1990).

dwelling, the Court of Appeals has eliminated or rewritten Fourth Amendment case law and has failed in its "solemn obligation of upholding the Fourth Amendment." *Peterson*, 525 S.W.2d at 609. Adams was using the immobile van as a dwelling, and he was "within the area immediately surrounding" the immobile van. (Op. 7). Adams was therefore upon the curtilage at the time of the arrest and the arrest was thus constitutionally invalid.

2. Probable Cause

To support a finding of probable cause, the Court of Appeals noted the following facts:

> At the hearing on appellant's motion to suppress, held on March 20, 1989, the state presented evidence sufficient to establish probable cause for a valid arrest without a warrant in the instant case. On September 22, 1989, Mike Heckenbach, a resident of Daviess County notified the Daviess County Sheriff's Office that marijuana was growing on the farm of appellant. The Sheriff's Office investigated the report and indeed found marijuana growing on the premises in what appeared "like corn field," that had been harvested. There were tire tracks leading to the marijuana, and the plants appeared to be cultivated. (Op. 7).

Appellant submits the following standard is appropriate for determining the existence of probable cause in light of the facts herein:

> Probable cause for an arrest without a warrant carries two requirements. First, the facts within the arresting officers' knowledge must be sufficient to warrant "a man of reasonable caution in a belief that an offense has been or is being

committed." Second, the facts must warrant a belief "that the person arrested is guilty of that offense." *State v. Olds, supra,* at 505. *See* also *State v. Garrett, supra,* stating that probable cause requires facts sufficient to warrant a belief that "*the person being arrested* had committed the offense for which he has been placed in custody" (emphasis added), and *State v. Berry,* 609 S.W.2d 948, 952 (Mo. 1980) (en banc), stating that probable cause requires facts sufficient to believe that *the defendant* has committed an offense.

In other words, reason to believe, or even certainty that an offense has been or is being committed does not constitute probable cause to arrest a particular individual unless reason also exists to believe that *that individual* committed the offense. Although "[a] broad gulf exists between what is necessary to prove one guilty and the requirement of probable cause of a warrantless arrest[,] . . . [b]are suspicion . . . is not enough to support a finding of probable cause for a warrantless arrest." *State v. Grady,* 548 S.W.2d 601, 608 (Mo.App. 1977).

* * *

Probable cause must, of course, be analyzed according to the facts known at the time of arrest, not according to facts learned later.

*Id.* at 255.

*State v. Moore,* 659 S.W.2d 252, 255 (Mo. App. W.D. 1983).

The Court of Appeals has conveniently overlooked the fact that the farm was composed of 80 acres and that the marijuana patch was located in an open field on the opposite end of the farm from the curtilage area and was not readily visible. Some of the plants were in the corn field and the rest were in a patch on the edge of the field.

The evidence also indicates that the officers had never observed Adams on any part of the farm prior to his arrest. Anyone else, including Mike Heckenbach, could have "cultivated" this marijuana. Simply put, the opinion herein permits an arrest based upon mere ownership of the property and mere suspicions.

Respectfully Submitted,

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Copy hereof this 13th day
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Kansas City, Missouri 64106

/s/ Bruce B. Brown

## IN THE SUPREME COURT OF MISSOURI

No. 72914
W.D. No. 42452

May Session, 1990

State of Missouri, Respondent,

vs. (TRANSFER)

Carl G. Adams, Appellant.

Now at this day, on consideration of Appellant's application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1990, and on the 31st day of July, 1990, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 31st day of July, 1990.

/s/ Thomas F. Simon Clerk

_____ D.C.

## APPENDIX B

Excerpts From Briefs

* * *

officer or the state be permitted to conceal that which the spirit of the rule is supposed to prevent by simply failing to write down such information? If this Court accepts such an argument, then it might as well formally repeal the discovery rules.

However, this Court should note that under Rule 25.03(A)(2), the State is required to disclose "the substance of any oral statements made by the defendant . . . " The State clearly violated this portion of the rule.

3. Alternate remedies

Appellant respectfully submits that requesting a continuance or postponement midway through trial is generally not an effective remedy because a substantial part of a defendant's trial strategy is formulated prior to trial and during the selection of the jury. Appellant relies upon the *Blake* case for the assertion that the prejudice herein is inherent but as the Respondent has recognized, the *Kilgore* Court has stated that a defendant must generally show some effect upon the outcome of the trial:

> To focus upon the effect of nondisclosure is reasonable and logical. The basic object of the discovery process is to permit the defendant a decent opportunity to prepare *in advance of trial* and avoid surprise. *State v. Sykes*, 628 S.W.2d 653 656 (Mo. 1982); *State v. Johnson*, 524 S.W.2d 97 101 (Mo. banc 1975). Where defense counsel has not had an opportunity to examine the state's

> evidence in advance of trial, that evidence is justly excluded if counsel can show that the outcome of the trial would have been different had he been able to prepare to meet that evidence. Where counsel is surprised by opposing evidence at trial, however, but deals with that evidence in precisely the same manner as if he had been fully prepared, there is no reason to exclude that evidence, however significant, based on a discovery violation. A lack of disclosure in such a case has no effect on the result of the trial. (Emphasis added).

771 S.W.2d at 66.

Although Appellant believes that blind adherence to such a rule may encourage wilful [sic] concealment or neglect on the part of the state, the Court should note that the testimony in question was similar to evidence known to defense counsel, the *Kilgore* prosecutor acted in good faith, and the *Kilgore* defendant failed to present any different course of conduct to the appellate court which might have affected the outcome of the trial.

In the case at bar, the defense counsel would have definitely first conducted additional pretrial discovery to determine whether any of the other officers overheard these alleged statements. Defense counsel may have also been able to question the co-defendant, Shirley Adkins, who was present at all times at the scene of the arrest where these statements allegedly were made. Second, *voir dire* questioning would have been geared to determine whether a potential juror might be prejudiced by contradicting statements of the defendant or give undue weight to the deputy's assertions. Undoubtedly, some people are automatically prejudiced by such evidence. *Voir dire*, not midway through trial, is the proper time to question and

discover such tendencies. This course of conduct should be considered "standard operating procedure".

In light of the materiality of the concealed evidence, the State's wilful [sic] concealment thereof, and the obvious alternative course of conduct, this Court should consider the violation of the discovery rules to be inherently prejudicial.

* * *

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(p. 3) INDEX

JURY TRIAL (PARTIAL TRANSCRIPT)
TUESDAY, AUGUST 15, 1989:

CLOSING ARGUMENTS ONLY

STATE'S CLOSING ARGUMENT: ..... 4

DEFENDANT'S CLOSING ARGUMENT: ..... 12

STATE'S FINAL CLOSING ARGUMENT:..... 24

Certificate..... 29

(p. 4) (REPORTER'S NOTE: This transcript contains only the closing arguments of counsel.)

THE COURT: You may proceed in closing argument.

MR. WEYBREW: Thank you, your Honor.

This morning, ladies and gentlemen, I spoke to you as to what the State must prove, and I told you that we

had to prove that he had more than 35 grams on September 24, 1988, in Daviess County, Missouri, in his possession. The Instruction No. 5 essentially says the same thing. I'll read from it. You'll get it and you can read from it. It says first that on September 24, 1988, in Daviess County in the State of Missouri, the defendant possessed more than 35 grams of marijuana. Every witness has testified that on that date they were at his farm. Behind the seat of the pickup they found that bag, State's Exhibit 1, which weighs more than 400 grams. Seventy-five grams of it was tested. That, I believe, takes care of that requirement.

Second requirement, that the defendant knew he possessed it. You heard the testimony that the defendant in a signed statement, after being advised of his rights, said he put it behind the seat of that pickup. That's possession. He put it there. He was in possession.

(p. 5) Third, that the defendant was aware of the nature and character of the substance. I submit, ladies and gentlemen, that you don't put trash behind the seat of your pickup. This ties in with the circumstantial evidence instruction.

If Mr. Adams found that on the road, when you pick up trash, you don't put it behind the seat and carry it for four days. Use your own experiences and your own judgment. That's why you're here. If you see a trash bag along side the road do you pick it up and store it carefully behind your pickup seat and carry it? I think not. I don't think we'd even stop. We'd leave that to the volunteers and the Highway Department to pick up the trash along the roads.

Ladies and gentlemen, it's a green leafy substance, apparent to be marijuana to any number of people. It was secreted in a pickup with a gun. It was with a shotgun. I don't think it was accidental that it was there. The circumstances are for you to judge. It is obvious the defendant knew what it was. He was transporting it in a dry, hidden area.

If you find those things beyond a reasonable doubt you will find the defendant guilty and you all promised that you would do that based upon the evidence. You've heard all the evidence. What I'm saying isn't evidence. (p. 6) What I'm saying is what I remember the evidence to be and I'm sure you all have a memory of the evidence.

You remember Trooper Kimberling indicating that he got consent to search from the lady who owned the pickup, and that the bag was found behind the seat. That bag. That bag full of marijuana. That that occurred in Daviess County, Missouri, on the 24th day of September, 1988. That he never met Carl Adams before, and I will submit to you he has no reason to fabricate any stories about Carl Adams. Didn't know him. Simply knew there was a warrant outstanding for his arrest.

Mr. Brown has made a big deal out of two guns and showed great shock in front of the jury that there were two guns, only to discover that he had been told previously there were two guns. You heard from Deputy Sheriff Smith that he removed the bag, sealed the bag, transported it to the forensic chemist at the Missouri Highway Patrol Lab. You heard from Kevin Krautmann, forensic chemist, that he examined it, found that the

sample that he took to test weighed more than 35 grams; that it was marijuana by three separate tests.

Mr. Brown tried to attack him with various and sundry plants, and Mr. Krautmann's testimony was the reason we run three tests is so there will be absolutely no doubt. There is no doubt that bag contains marijuana. (p. 7) Over a pound of it.

You heard Sheriff Tom Houghton testify that the defendant, when asked and warned on two occasions of his rights, still wrote down that he had put that bag behind the seat of that pickup. That bag full of marijuana.

I would submit, ladies and gentlemen, in your own experience how often have you gone out, picked weeds at random and put them behind the seat of a car or a pickup? I never have. I would suspect that you never have either.

MR. ROY BROWN: I hate to interrupt you, your Honor, but that's a personal aspect to his argument. That's improper and I object to it.

THE COURT: Be sustained.

MR. WEYBREW: That's why you're here is to apply your own experiences. That's why we have the jury system for you to apply what that you know people do and things that happen to this case.

You also heard Sheriff Tom Houghton testify that the defendant, Carl Adams, said that he had found that bag of marijuana at the gravel road near his farm four days before and put it behind the seat of the pickup. You heard Deputy Bill Wright testify that when asked or he mentioned that he had found it on an off ramp on I-35.

(p. 8) MR. ROY BROWN: Your Honor, I object. Please come forward. I hate to interrupt your argument.

(Whereupon the following proceedings were had at the bench, out of the hearing of the jury:)

MR. ROY BROWN: This is a highly contested situation where he's claimed he didn't know about it and I think the officer should have been sanctioned and he should have been. I object to him making that argument.

MR. WEYBREW: It is the evidence, your Honor. Mr. Brown should not interrupt when I'm arguing the evidence that was admitted by the Court.

MR. ROY BROWN: I apologize for interrupting but I would object to him going into that line.

THE COURT: Objection be overruled.

(Whereupon the proceedings returned to open court.)

MR. WEYBREW: Let me backtrack a second. You've heard Tom Houghton, the Sheriff of Daviess County, testify he found State's Exhibit 1, the bag of marijuana, on the gravel road near his farm. Yet he said in hearing of Bill Wright that he found it on the off ramp of I-35. If he didn't know what was in the bag why would he tell two different stories on the same day about where it came (p. 9) from if he didn't know what was in that bag? Why didn't he tell somebody he didn't know what was in that bag?

Ladies and gentlemen, this man had that much marijuana. He put it behind the seat of a pickup. He did it in Daviess County and he did it on that day, and that's a

crime. Ladies and gentlemen, it's not a minor crime. You and I – all of us – are in the front lines of a war on drugs. We are the soldiers. You by selection from 37, me by profession. We are what our society is counting on to stop what's happening to it, to stop the poisoning of youth, to stop the erosion of the values of this society. We are the people that the people of Daviess County and Livingston County are looking to to stop this abuse of drugs. No one else. I'm sure all of you this morning were hoping it would be somebody else and I thank you for your patience in listing to this case. Nonetheless, you are the twelve. When you hear Paul Harvey and others say, yes, how this came out, this man was allowed to go free. It was twelve people who did that. Don't be those twelve.

This man had that much marijuana. He had it in his possession. He was keeping it. He was protecting it; and, ladies and gentlemen, that is a crime. That is a serious crime, a situation our society finds it in. Drugs are a threat to all of us. In the cities I'm sure

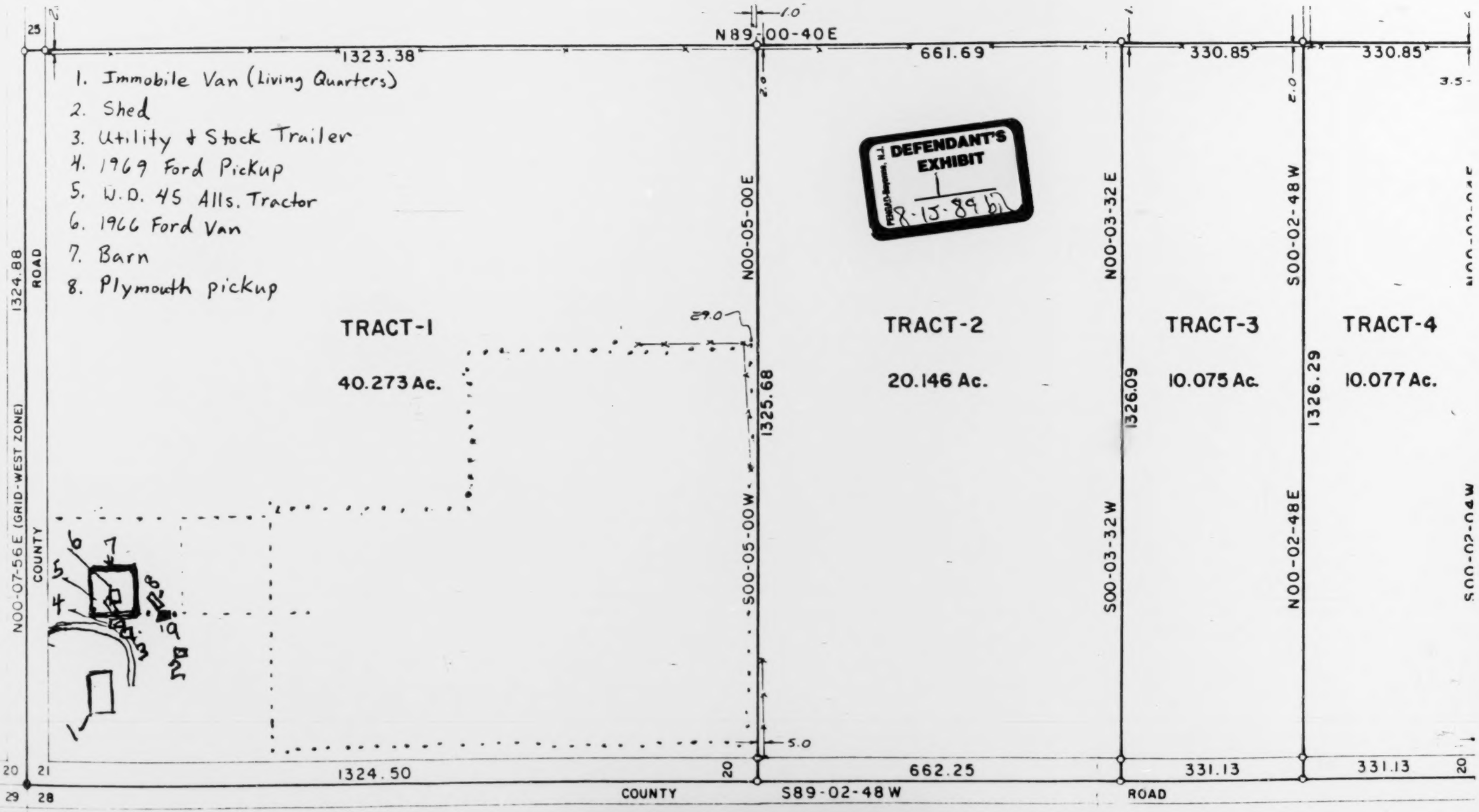
* * *

(p. 26) that? If we were going to make cases we wouldn't make marijuana cases. We'd make cocaine cases, make heroin cases, make LSD cases. Why fabricate about the guns? We're talking about marijuana here today. Doesn't make any sense and that's why you're here. You know it doesn't make any sense. It doesn't fit with what you know and that's why you're not to believe.

The defense attorney raises the question of did he know what it was. Well, what did he tell Tom Houghton? Told him he found the bag of marijuana and put it behind the seat. He wrote out that he found a bag of plant leaves,

but he told Tom Houghton he found the bag of marijuana out by the road. That's some different. And did he write out while he had the pen in his hand on the piece of paper, did he write out I put the bag of plant leaves behind the seat and didn't know what they were? Did he write that? Have you heard any evidence today from the witness – that witness stand that said he said he didn't know what it was? I don't think so. I don't remember it.

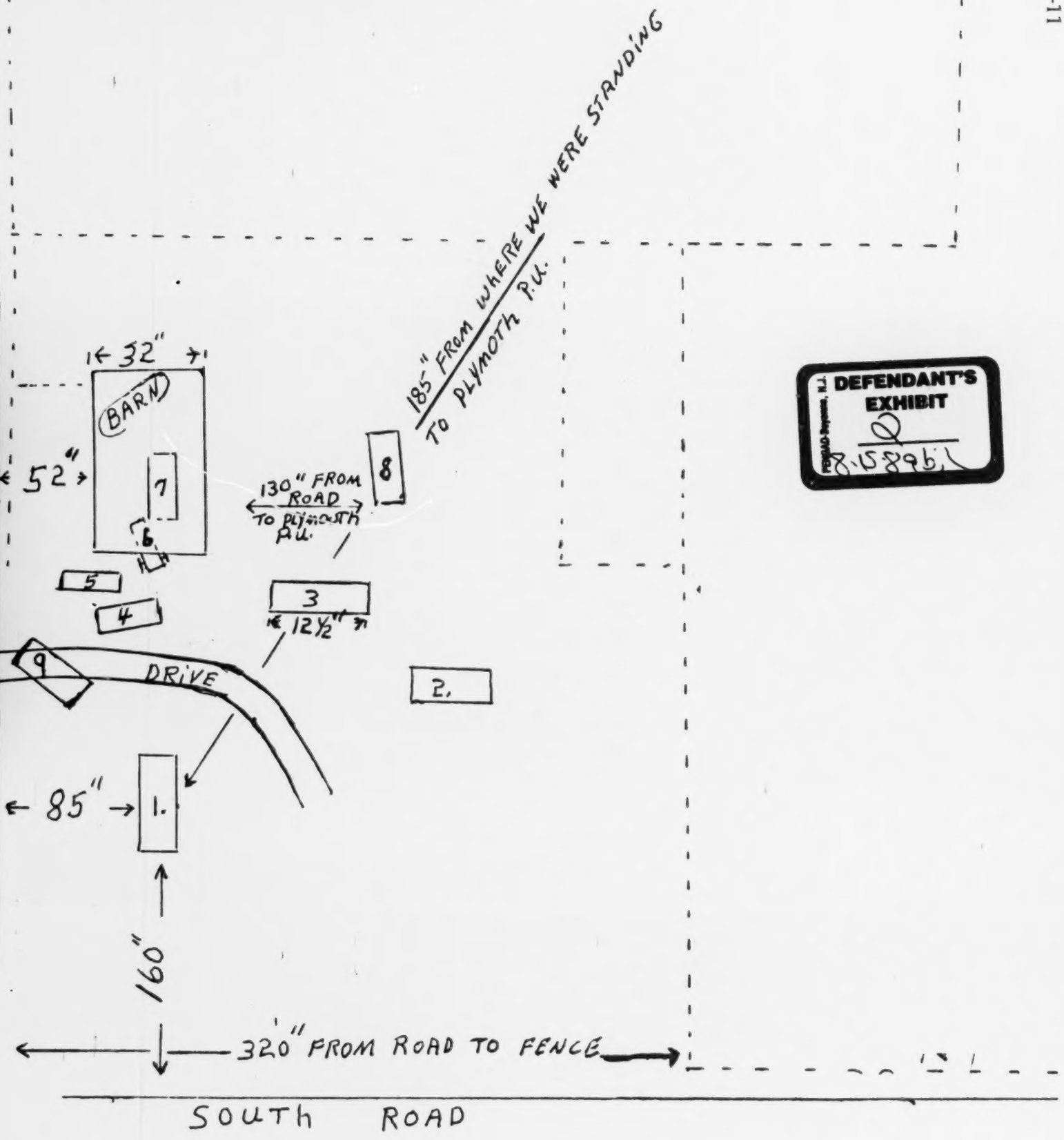
If every defendant charged with drugs from the millions of pounds of cocaine that come in this country to the millions of pounds of marijuana that come into this country could escape punishment for what he's doing to us, our children, and our society by simply saying I




BEST AVAILABLE COPY

1. MOTOR HOME
2. SHED
3. 8½" X 12½" SHED
4. STOCK TRAILER
5. 1969 FORD PICKUP
6. W.D. 45 ALLIS CHALMERS TRACTOR
7. 1966 FORD ECONO VAN
8. 1973 PLYMOTH PICKUP
9. STATE PATROL CAR
10. WOVEN-WIRE-WITH-BARBS



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STATE'S EXHIBIT 2

8-15-89

**Statement of Miranda Rights**

1. You have the right to remain silent.
2. Anything you say can and will be used against you in court of law.
3. You have the right to talk to a lawyer and have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

**Waiver of Rights**

I have read the above statement of my rights and I understand each of those rights, and having these rights in mind I waive them and willingly make a statement.

/s/ Carl G. Adams

Witnessed by:

/s/ Tom Houghton
Officer's Name

/s/ Daviess Co. Sheriff Dept.
Officer's Department

Date: 9-24-1988

Time: 4:20 P.M.

I.F. # ___ C.A.F. # ___

## VOLUNTARY STATEMENT

DATE 9-24-88 PLACE Daviess Co. Sheriff Off. STARTED 5:50 P.M. I, the undersigned, Carl Adams, am 50 years of age, having been born on 7-4-38, at Alton, MO. I now live at 7714 Elm Raytown, MO. I have been duly warned and advised by Tom Houghton, a person who identified himself as Sheriff Daviess Co, that I do not have to make any statement at all, nor answer any questions or do anything that might tend to go against me or incriminate me in any manner, and that any statement I make, can and will be used against me on the trial or trials for the offense or offenses concerning which the following statement is herein made. I was also warned and advised of my right to the advice and presence of a lawyer of my own choice before or at any time during my questioning or statement I make, and if I am not able to hire a lawyer I may request and have a lawyer appointed for me, by the proper authority, without cost or charge to me.

I do not want to talk to a lawyer, and I hereby knowingly and purposely waive my right to the advice and presence of a lawyer before and during any questioning or at any time before or while I voluntarily make the following statement to the aforesaid person, knowing that anything I say can and will be used against me in a court or courts of law.

I declare that the following voluntary statement is made to the aforesaid person of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor,

without leniency or offer of leniency, by any person or persons whomsoever.

I was aware the Green plants were growing in a field where I had planted corn.

I did place the bag of plant leaves behind the seat of a 1982 Plymouth pickup.

I have read each page of this statement consisting of ___ page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 5:59 P.M. on the 9-24-88 day of ___, 19 ___.

WITNESS: /s/ Tom Houghton

WITNESS: /s/ Robert Smith

/s/ Carl G. Adams
Signature of person giving voluntary statement

## APPENDIX C

IN THE CIRCUIT COURT OF DAVIESS COUNTY, MISSOURI. ASSOCIATE CIRCUIT DIVISION

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | |
| | ) | |
| PLAINTIFF, | ) | CASE NO. CR |
| VS. | ) | 488-832F |
| | ) | |
| CARL GENE ADAMS, | ) | |
| | ) | |
| DEFENDANT. | ) | |

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, and pursuant to Section 542.296, R.S. Mo., hereby moves for an Order suppressing from the use in evidence (a) items taken from the person, premises, and/or automobile in which the defendant had a superior right or interest, or which the State alleges defendant to have had possession, and in which the defendant had a legitimate expectation of privacy, (b) statements alleged to have been made by the defendant, and (c) suppression of all evidence or the fruits thereof, upon the following grounds:

1. That the arrest, if any, was illegal, unconstitutional and unreasonable, in that at the time the claimed arrest was made no offense was being committed in the officer's presence nor was the defendant reasonably suspected of having committed any felony, the arrest was made without probable cause, the officers had no warrant for arrest and/or the arrest came after the search and seizure.

2. That certain statements, oral and/or written alleged to have been taken from defendant, were taken

unlawfully without defendant being properly advised of his rights as per *Miranda v. Arizona* and/or without defendant's voluntary consent and/or without the defendant's knowing and intelligent waiver of said rights.

3. That the search and seizure were made without warrant and without other lawful authority and was conducted in an unreasonable and unlawful manner.

4. That the search and seizure were made without probable cause, and there were no exigent circumstances justifying or authorizing the search and seizure.

5. That the search and seizure were not made substantially contemporaneous with a lawful arrest or was not confined to the immediate vicinity of the arrest; that the search was general in nature and went beyond the area of arrest.

6. That the search and seizure were illegal and unconstitutional since the exigent circumstances which justify or authorize a search incident to a lawful arrest did not exist at the time of the search.

7. That the search and seizure were made for other than the fruits of the offense for which the arrest was made and/or were made without a reasonable articulable suspicion to stop, and not for the officer's protection.

8. That the officers were not making a reasonable and bona fide inventory or inspection but were making a warrantless search and seizure.

9. That any consent was not voluntarily and/or understandingly and knowingly given.

10. That the items were not in the plain view of the officers and were at a place they had a lawful right to be.

11. That in any other manner the search and seizure and/or the taking of statements violated the defendant's rights guaranteed him by Sections 10, 15 and 19 of Article 1 of the Constitution of the State of Missouri, and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

12. That as a result of this unlawful search and seizure incriminating evidence was obtained and statements taken.

WHEREFORE, the Defendant requests that all evidence so obtained and/or any statements so taken, and the fruits thereof, be suppressed and for such other and further orders as the Court deems proper.

/s/ Roy W. Brown
ROY W. BROWN,
BAR # 14824
BOX 679
KEARNEY, MO. 64060
816-635-6100

ATTORNEY FOR DEFENDANT

Copy hereof this 15th day
of November, 1988 to Office of
Prosecuting Attorney, Daviess County
Courthouse, Gallatin, Missouri

/s/ Roy W. Brown
ROY W. BROWN

IN THE CIRCUIT COURT OF
LIVINGSTON COUNTY, MISSOURI.

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. CR |
| vs. | ) | 789-14F |
| | ) | |
| CARL ADAMS, | ) | |
| | ) | |
| Defendant. | ) | |

ORDER

On this 20th day of March, 1989, the State appears by and through the Prosecuting Attorney of Daviess County, Missouri, Honorable Syd Weybrew, and the Defendant appears in person and by attorneys, the Honorable Roy Brown and the Honorable Bruce Brown. Defendant's Motion To Suppress comes on regularly to be heard and is called. State presents its evidence and the Defendant presents evidence. The Motion To Suppress is taken under advisement by the Court, pending the filing of Suggestions by the Defendant within ten days, and Suggestions in response to be filed by the State two days thereafter.

Now on this 4th day of April, 1989, the Court being fully advised in the premises, having heard the evidence presented and the arguments of counsel, including their Suggestions, finds that the State has shown by a preponderance of the evidence that the Motion To Suppress should be overruled.

IT IS, THEREFORE, ORDERED that Defendant's Motion To Suppress is overruled.

Dated: 4-5-89

/s/ Stephen K. Griffin
Stephen K. Griffin, Judge

IN THE CIRCUIT COURT OF
LIVINGSTON COUNTY, MISSOURI.

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. CR |
| vs. | ) | 789-14F |
| CARL ADAMS, | ) | |
| | ) | |
| Defendant. | ) | |

MOTION FOR JUDGMENT OF ACQUITTAL AND DISCHARGE NON OBSTANTE VERDICT OR, IN THE ALTERNATIVE MOTION FOR NEW TRIAL

(Filed September 8, 1989)

COMES NOW Defendant, in person, and by and through his attorney, and moves the Court for its Order granting Defendant's Motion for Judgment of Acquittal and Discharge Non Obstante Verdict or in the Alternative Motion for New Trial. In support hereof Defendant states and alleges as follows:

1. That on August 15, 1989, a jury convicted Defendant of the charge alleged in the Information and assessed his punishment at five (5) years in the department of corrections.

2. That the State failed to overcome its burden of proof as to the Motion to Suppress for the reasons as stated in said motion and, without limiting the reasons set forth therein, for the reasons as set forth in the suggestions in support of the motion to suppress. That the Court erred as a matter of law and to the prejudice of the Defendant by not sustaining this motion.

3. That the Court erred as a matter of law and to the prejudice of the Defendant by not permitting the introduction of Defendant's Exhibits 1, 2, and 3 in the pretrial suppression hearing on August 15, 1989. With regard to Exhibits 1 and 2, the State knows, or should know through any if [sic] its witnesses, the location of the structures and vehicles on Defendant's premises as reflected in those exhibits. The State cannot claim any surprise or prejudice and could have shown the exhibits to any of its witnesses to determine whether the exhibits fairly and accurately reflected the locations of the structures and vehicles on Defendant's premises on September 24, 1988. All of the State's witnesses who testified at trial, except the chemist, were on the premises on September 24, 1988. Defendant is thereby being deprived of his right to present evidence in his defense. *See, State v. Kimmel,* 720 S.W.2d 790, 791 & 792[1] (Mo. App. W.D. 1986).

As to Exhibit 3, the State was present at the preliminary hearing and heard all of the evidence presented. Both of the witnesses who testified at the hearing were present on the date of trial – Trooper Kimberling and Sheriff Houghton. The State cannot claim to be surprised or prejudiced by any of the testimony contained in Exhibit 3 and further could have reviewed the testimony with these officers to check the accuracy of the record. Defendant was again deprived of the right to present evidence in his defense. *See, Kimmel, supra.*

4. That the Court erred as a matter of law and to the prejudice of Defendant in not granting Defendant's Motion to Dismiss for the reason that said Information fails to state a cause of action upon which guilt can be predicated and punishment assessed in that it fails to

apprise defendant of the acts or offense with which he is charged and in that it fails to charge an offense.

5. The Court erred as a matter of law and to the prejudice of the Defendant by not sustaining Defendant's objection to the introduction into evidence of the testimony of Deputy Bill Wright with regard to Defendant's alleged statement about where he found the bag of marijuana. During the hearing on the motion to suppress on March 20, 1989, Deputy Wright testified and was subjected to extensive questioning by defense counsel. Deputy Wright did not reveal this alleged statement at any time. In addition, Deputy Wright made a report which was produced by the State pursuant to defendant's request for discovery. *See,* Exhibit One. Again, Deputy Wright failed to report such statement.

On the day of trial, the State requested leave to endorse Deputy Wright as a witness and during his testimony, Deputy Wright revealed the statement, in question for the first time, completely surprising the Defendant. The State also used this statement in its closing argument to show inconsistencies in the Defendant's alleged statements to the officers and argued to the jury, over Defendant's objections, that such inconsistencies indicated knowledge and awareness of the illegal character of the substance in the bag. Failure to reveal the statement in question was in violation of Defendant's constitutional and statutory rights to discovery, and failure to produce such statement and use it in the trial for the aforesaid purpose resulted in fundamental unfairness to the Defendant. *See, State v. Blake,* 620 S.W.2d 359 (Mo. banc 1981). Therefore, a new trial should be granted.

6. The Court erred as a matter of law and to the prejudice of the Defendant by not sustaining Defendant's request for mistrial when Sheriff Houghton testified that marijuana plants were discovered on Defendant's premises. His testimony was not responsive to defense counsel's question about whether the sheriff found any other marijuana in the buildings or vehicles located on the premises. Such evidence permitted the jury to infer or believe that the Defendant was involved in manufacturing marijuana, which is the subject matter of another charge now pending for trial. Up to the time of the sheriff's aforesaid testimony, the evidence at trial was limited to events occurring on September 24, 1988, at the premises surrounding the immobile van and some of the statements made by Defendant thereafter. Such evidence was prejudicial to Defendant because it may have affected the jury's decision to find Defendant guilty and/or to assess the maximum punishment of five years. Therefore, a new trial should be granted.

7. The State wholly failed to prove by credible and substantial evidence beyond a reasonable doubt the corpus delecti of possession of marijuana and/or failed to exclude all reasonable hypotheses of his innocence.

8. The court erred as a matter of law and to the prejudice of the Defendant because Defendant believes that the Court failed to admonish the jury in compliance with MO. REV. STAT. Section 546.230 and MAI-CR3d 300.04 when the Court took a recess in excess of an hour in the afternoon on the day of trial. Defendant believes this event occurred after the State rested. Therefore, a new trial should be granted.

9. The trial court erred as a matter of law and to the prejudice of the Defendant when it permitted the chemist to testify as to the contents of State's Exhibit ___ and permitted the introduction of this exhibit foundation for its introduction by failing to show a proper chain of custody.

WHEREFORE for the reasons set forth herein, the Defendant respectfully requests this Court to sustain either of the motions herin [sic], granting a new trial or discharging the Defendant for his costs, and for such other relief as this Court deems just.

BROWN & BROWN
BY: /s/ Roy W. Brown
ROY W. BROWN,
Bar No. 14824
Box 679
Kearney, Missouri 64060
(816) 635-6100

ATTORNEYS FOR DEFENDANT

Copy hereto this 7th
day of September, 1989 to
SYD WEYBREW
PROSECUTING ATTORNEY
106 N. MARKET
GALLATIN, MISSOURI
/s/ Roy W. Brown
ROY W. BROWN